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A TREATISE

ON

THE HINDOO LAW

OF

INHERITANCE,

COMPRISING

THE DOCTRINES OF THE VARIOUS SCHOOLS,

WITH

THE DECISIONS OF THE HIGH COURTS

OF

THE SEVERAL PRESIDENCIES OF INDIA,

AND

THE JUDGMENTS OF THE PRIVY COUNCIL ON APPEAL.

BY

STANDISH GROVE GRADY,

BARRISTER-AT-LAW, RECORDER OF GRAVESEND.

Author of the "Law of Fixtures and Dilapidations, Ecclesiastical and Lay," and Joint-Author of the "Law and Practice of the Crown side of the Court of Queen's Bench," &c. &c. &c.

"God having created the four classes, had not completed His work; but, in addition to it, lest the Royal and Military class should become unsupportable through their power and ferocity, He produced the transcendent body of Law. Since Law is the King of kings, far more powerful and rigid than they. Nothing can be mightier than Law, by whose aid, as by that of the highest monarch, even the weak may prevail over the strong."—1 *Morl. Dig.*, Introduction cxciv.; *Chintamani*, Pref. xxi.

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LIST OF ABBREVIATIONS.

Bac. Abr.	Bacon's Abridgment.
Bengl. H. C. R.	Bengal High Court Reports.
Ben. Reg.	Bengal Regulations.
B. S. D. A. R.	Bengal Sudder Dewany Adawlut Reports.
Borr.	Borrodaile Reports.
Bomb. R.	Bombay Reports.
Cl. R.	Clarke's Reports.
Coleb.	Colebrooke.
Coleb. Dig.	Colebrooke's Digest.
C.	Colebrooke.
Co. Lit.	Coke upon Littleton.
Coleb. Oblig.	Colebrooke's Contracts and Obligations.
Datt. Chandrika.	Dattaka Chandrika.
Dat. Mimansa.	Dattaka Mimansa.
Dig.	Digest.
D.	Dorin.
Elements of Hindoo Law.	Sir Thos. Strange's Hindoo Law.
E.	Ellis.
Fulton.	Fulton's Reports.
F. Macn. Cons.	Sir Francis Macnaghten's Considerations.
Inst.	Institutes.
Jim. Vahana.	Jimuta Vahana.
Judgt. of Sudr. Court in S. A.	Judgment of Sudder Court in Special Appeal.
Knapp. P. C.	Knapp's Privy Council.
Koollooka Bhat.	Koollooka Bhatta.
M. D.	Madras Decrees.
Mad. H. C. R.	Madras High Court Reports.
Mad. N. of Cas.	Madras Notes of Cases.
Mad. Reg.	Madras Regulations.
Mad. Sel. Dec.	Madras Select Decrees.
Mad. Sudr. Judgts.	Madras Sudder Judgments.
M. S. D.	Madras Sudder Dewany.
Macn. P. H. L.	Macnaghten's Principles of Hindoo Law.
Mitac.	Mitacshara.
Mitacsh. on Inh.	Mitacshara on Inheritance.
Moore's In. Ap.	Moore's Indian Appeals.
Morl. Dig.	Morley's Digest.
O. S.	Original Suit.
Pro. of Sudr. Court.	Proceedings of Sudder Court.
R. A.	Regular Appeal.
Reg.	Regulations.

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Sel. Dec.	Madras Select Decrees.
Sudr. Court.	Sudder Court.
S. A. R.	Sudder Adawlut Reports.
S. D.	Sudder Dewany.
S. D. A.	Sudder Dewany Adawlut.
Sud. Dec.	Sudder Decrees.
Sud. D. U.	Sudder Dewany Udawlut.
S. S. A. A.	Special Appeals.
Smriti Chand.	Smriti Chandrika.
Steele.	Steele's Synopsis of the Law of Hindoo Castes.
Stra. H. L.	Strange's Hindoo Law.
Stra. Man. H. L.	Strange's Manual of Hindoo Law.
Stra. N. of C.	Strange's Notes of Cases.
Stoke's H. L. B.	Stoke's Hindoo Law Books.
Sutherl. Synop.	Sutherland's Synopsis.

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ERRATA.

Page 4, line 12 from bottom, after "marriage," substitute a (,) for (.)
" 5, " 1, for "Paisacha" read "Paishacha."
" 5, " 6 of second para. dele "whether this."
" 5, " 9 from bottom, for "Stra." read "1 Stra."
" 9, " 21 from bottom, for "Agyangai" read "Ayyangai."
" 12, " 12 from bottom, for "who" read "which."
" 33, " 4 from bottom of first para., after "Mankur" add "v."
" 33, " 4 of second para., for "Dee" read "Dec."
" 42, " 3 in last para., after "person" add "if."
" 51, " 3, after "Venkalesaiya" add "v."
" 53, " last of first para., for "Begl." read "Bengl."
" 53, " last of second para., for "38" read "41."
" 57, " 8 from bottom, for "38" read "41."
" 58, " last of first para., add "ante p. 27."
" 58, " 5, for "acquired by the adoptor in consequence of his" read "of one taken out of the family by."
" 66, " 3 from bottom, in note, after "Mudali" add "v."
" 75, " 18 from bottom, after "his" add "life."
" 78, " 12 from bottom, for "debtor" read "creditor."
" 87, " 2 from bottom, for "adulterers" read "adulterous."
" 109, " 2 from top, for "Bombay" read "Calcutta."
" 133, " 19 from bottom, for "granters" read "grantors."
" 148, " 2 of first para. for "or" read "of."
" 229, " 5 from bottom, for "civil death" read "several wives."
" 233, " 8 from bottom, for "civil death" read "several wives."
" 247, " 16 from top, for "suffer" read "differ."
" 260, " 14 for "nullus" read "nullius."

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INTRODUCTION.

WHEN the Directors of The Honourable East India Company found themselves compelled, by a course of events over which they could exercise but little control, to undertake the government of the different provinces of the country, of which they originally became masters, their first inquiry was naturally directed to a consideration of the laws administered among the natives of India. Ignorant as the British were, at the commencement of their career, of the manner in which the administration of the country had been conducted by the native Governments, the wisest course that presented itself was to leave matters, as far as possible, in *statu quo*. This was the course pursued; gradually, however, alterations were introduced, as artificial as any to be found in civilised Europe.

Notwithstanding the length of time during which the Mahommedans governed the country, they abstained from interfering with the civil laws of the Hindoos, but superseded their criminal laws by those of the Koran. An apparently artificial, but when understood, in reality a simple revenue law had been introduced by the Emperor Akber. In states governed by Hindoo princes, both the Hindoo civil and criminal laws were, of course, the laws of the land. Whether the revenue law, found to exist on the assumption of power by the British, owed its origin to the Mahommedans, or was simply an adaptation of the Hindoo revenue law existing at the conquest of the country by the Mahommedans, is a question which would be difficult of solution; but from the circumstance that the revenue system throughout the country, even in those parts where the Mahommedans never exercised sovereignty, is nearly the same, we are inclined to think that

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the Mahommedans wisely permitted the Hindoo revenue system to exist, and gradually introduced such changes as the requirements of the times demanded.

Some years after the British had been called upon to exercise the duties of sovereigns, they allowed the administration of the country to be conducted on the native model. It was not until the time of Warren Hastings—one of the greatest Governor-Generals that India has ever seen—that an attempt was made to place within the reach of European intelligence a knowledge of the native laws. It was in his time that a "Digest of the Hindoo Law" was compiled and translated by Mr Halled, and a translation made of the "Hidayah"—a commentary on the Mahommedan laws, civil and criminal—by Mr Hamilton. These two works gave Europeans intrusted with the administration of justice some idea of the laws they were required to administer. Lord Cornwallis, in the year 1793, introduced into Bengal a code of regulations providing for the administration of civil and criminal justice and fiscal law, altering as little as possible the existing native laws, but introducing courts of various grades, and a system of procedure. These regulations were subsequently adopted as models by the Madras and Bombay Governments; consequently, at the commencement of the nineteenth century the laws administered in India were the Hindoo laws to Hindoos, the Mahommedan laws to Mahommedans; and in the Presidency of Calcutta, Madras, and Bombay, the laws of England to Englishmen. In the Mofussil the criminal law administered to Hindoos and Mahommedans was the criminal law of the Koran, as modified by Regulation.

The judges of the Presidency towns were barristers sent out from England, for the purpose of occupying the bench of the Supreme Courts, and administering justice within the circumference of the small extent of territory comprised within their jurisdiction. Although they were required to administer both the Hindoo and Mahommedan laws, or systems of law, what they really did administer was chiefly the law of England; and with rare exceptions, few of these judges knew much of any other. The judges of the Mofussil Courts were

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selected from writers or civil servants, who originally obtained their appointments from the Directors of the East India Company. These officials had probably received the ordinary education of English gentlemen. Although, however, they were required to pass several examinations in law previously to proceeding to India, but few of them had any practical knowledge of the law before their elevation to the Bench. Prior to the year 1846, English barristers were not at liberty to practice before the Mofussil Courts. Their exclusion was attended with a twofold disadvantage;—the knowledge of the principles of law could not be brought to bear upon the intelligence of the Mofussil judge, and they themselves were deprived of the inducement to study the Hindoo and Mahommedan laws with that degree of attention which might tend to elucidate their principles.

In 1855 the method of selection for the Indian Civil Service was changed, and the competitive system of examination introduced. Before this, appointments in the service were in the gift of the Directors; who were elected by the proprietors of Indian stock. It would be singular disinterestedness if Directors so elected did not duly regard the claims of their constituents. The consequence was that the Indian Civil Service was looked upon as a close preserve, and the chief recommendation to obtain admission to it was connexion with, or relationship to, an East Indian director or proprietor. Ability was a secondary consideration; and once in, whatever might be a man's qualifications, he stood a fair chance of rising to the highest post, if he only lived long enough. Promotion went not wholly by seniority indeed, but the claims of seniority were held so sacred that the force of patronage seldom ventured to set them aside. Under such a state of things, it is surprising that the Indian Civil Service succeeded in producing so many very eminent men; but in general, to quote the words of a learned author, the mass was "one dead level of incompetence." Nevertheless, we shall be glad to find that the new system produces a similar number of eminent men as compared with the incompetents. Under

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the prior system of appointment, family connexion, it is to be feared, influenced the administration of the country more than a feeling for the good of the people. Hitherto it has been the custom, although a change in public opinion has already taken place, to look down upon the competition Wallah as of a class inferior to that from which the civilian of the old school had been selected. We believe no foundation for this prejudice in reality exists, and that a minute and exact investigation would lead to the conclusion that the ranks of society formerly represented in the service are equally represented in the present day. If new blood has been introduced, it has been introduced from the healthy source of intellectual superiority which in India, as in England, must equally make its way. It is to be hoped that this change will break through that system based on family connexion which induced in too many instances civilians of the old school to support each other irrespective of merit, and to make common cause when their order or personal feelings were assailed.

In 1858, in consequence of the mutiny of the previous year, the Government of the country was assumed by the Crown. In 1862 the superior tribunals—viz., the Sudder Courts, which exercised a control over the proceedings of the Mofussil Courts, and the Supreme Courts of the Presidency towns — were amalgamated under the designation of "High Court," the Judges of both Courts continuing to hold office, and future vacancies being provided for by the appointment of a proportionate number of barristers, Indian civilians, uncovenanted judges, or vakeels. It was provided by the Charter that the law and practice, as modified by subsequent enactments, which prevailed in the late Sudder Courts, should apply to cases civil and criminal coming from the Mofussil; and the law and practice of the late Supreme Courts, similarly modified, should apply to cases originating in the Presidency towns. Of late years legislation has made great progress in India. Unfettered by preconceived predilections, the legislators of the country have considered themselves at liberty, in framing their laws, to refer to first principles, and to select whatever is valuable from the

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codes of other countries. Guided by experience when adopting the laws of England, they are able to avoid difficulties which English legislators have been unable to surmount; and if they continue to persevere in the same spirit, probably the Indian codes may in time become models of imitation for other countries. A code of civil procedure, simple and inexpensive, has been introduced; and although on the amalgamation of the Courts it was feared that it was not sufficiently elastic to embrace the classes of business falling within the original jurisdiction of the High Courts, its powers of expansion have falsified the fears entertained of their efficacy. A penal code has likewise been introduced which will bear a fair comparison with that of any other state. A criminal procedure code has been passed; its application, however, is confined to the Mofussil, and has not yet been extended to the Presidency towns. Other codes are in course of preparation, and in progress of time it is to be hoped that a complete code of laws will be provided, thus obviating the necessity of relying on analogies, often forced, for principles whereon to base a judgment.

The laws administered in India are therefore:—

1. The Hindoo, which is divided into,
    1. The Gauriya School, or that of Bengal.
    2. Mithila School, or that of North Behar.
    3. The Benares School.
    4. The Mahratta School.
    5. The Dravada School, or that of Madras.
2. The Mahommedan, which is divided into,
    1. The Sunni.
    2. The Shiya.
3. The common law as it prevailed in England in the year 1726, and which has not subsequently been altered by statutes expressly extending to India, or by the acts of the Legislative Council of India.
4. The Statute law which prevailed in England in 1726, and which has not been subsequently altered by statutes especially extending to India, or by the acts of the Legislative Council of India.

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5. Acts of Parliament expressly relating to India which have been enacted since 1726 and have not since been repealed, and statutes which have been extended to India by the acts of the Legislative Council of India.
6. The common law of the land.
7. The Codes of Civil and Criminal Procedure.
8. The Revenue law.
9. The Civil law as it obtains in the Ecclesiastical and Admiralty Courts of England.
10. The Regulations made by the Governor-General in Council, and the Governors in Council previously to the 3d and 4th W. IV. c. 85, and registered in the Supreme Courts and the acts of the Legislative Council of India, made under the 3d and 4th W. IV. c. 85.

The charter of George II. granted in 1753 is the first instance we find of the reservation of their own laws to the natives of India. This was effected by an express exception from the jurisdiction of the mayor's court of all suits and actions between the Indian natives only.

In 1772, when Warren Hastings' celebrated plan for the administration of justice was adopted, the 23d Rule especially reserved their own laws to the natives, and provided that Moulavies or Brahmins should respectively attend the courts to expound the law and assist in passing the decree.

In 1780, the first Regulation enacted by the Bengal Government after the Governor-General and Council were invested by Parliament with the power of making regulations embodied the 23d Rule; and the 27th section enacted "that in all suits regarding inheritance, marriage, and caste, and other religious usages and institutions, the laws of the Koran with respect to Mahommedans, and those of the Shaster with respect to Gentoos, shall be invariably adhered to."

In the revised code which passed the following year, this section was re-enacted with the addition of the word "succession."

In 1781, the declaratory Act of 21 Geo. III. c. 70, explain-

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ing and defining the powers and jurisdictions of the Supreme Court at Fort-William in Bengal, by section 17 enacted that in disputes between the native inhabitants of Calcutta, their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined in the case of Mahommedans by the laws and usages of Mahommedans, and in the case of Gentoos by the laws and usages of Gentoos; and where only one of the parties shall be a Mahommedan or Gentoo, by the laws and usages of the defendant; and their laws and customs were expressly preserved to them by section 18, which enacted that, "In order that regard should be had to the civil and religious usages of the said natives, the rights and authorities of fathers of families and masters of families, as the same might have been exercised by the Gentoo or Mahommedan law, shall be preserved to them respectively within their said families; nor shall any acts done according to the rule and law of caste respecting the members of the families only be held and adjudged a crime, although the same may not be held justifiable by the laws of England;" and by section 19 the court was empowered to frame process, and make such rules and orders for the execution thereof in suits, civil and criminal, against the natives as might accommodate the same to the religion and manners of the natives, as far as the same might consist with the due execution of the laws and the attainment of justice.

These provisions were extended by the 37 Geo. III. c. 142, to the natives of the Presidencies of Madras and Bombay. The 13th section added to the words of the 17th section of 21 Geo. III. c. 70, *supra*, the following words: "Or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a native court, and where one of the parties shall be a Mahommedan or Gentoo by the laws and usages of the defendant; * and in all suits so to be determined by the laws and usages of the natives, the said courts shall make such rules and orders for the conduct of the same, and frame such process

* These Regulations apply to Hindoos and Mahommedans not by birth only but by religion, *Abraham* v. *Abraham*, 9 *Moore's In. Ap.* 319.

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for the execution of their judgments, sentences, or decrees, as shall be most consonant to the religions and manners of the said natives, and to the said laws and usages respectively, and the easy attainment of the ends of justice; and such means shall be adopted for compelling the appearance of witnesses and taking their examination as shall be consistent with the said laws and usages, so that the suits shall be conducted with as much ease and at as little expense as is consistent with the attainment of substantial justice."

The charters of justice for the Supreme Courts at Madras and Bombay contain the same provisions.

The charters of justice establishing the High Courts at the different Presidencies contain similar provisions.

It is therefore apparent that a young barrister who has completed his education in the Inns of Court, and who may select India as the sphere of his professional operations, will find not only much that he has learned in England useless to him in India, but that it will be necessary that he should commence a fresh course of study before he can feel any confidence in himself when conducting a case connected purely with local law. If a barrister who devotes his time entirely to the study of law will have to encounter such difficulty how much greater must be the difficulty of one, who (without a knowledge of the principles which a barrister must acquire to a greater or less extent) will have to study the number of books requisite to give him an insight into the principles of those laws.

An Indian civil servant shortly after his arrival will occupy a post which will require a competent knowledge of these various branches of law to enable him to fulfil his duties with credit to himself, benefit to the public, and satisfaction to the government. He ought to acquire that knowledge here, for amidst the great variety of official functions which he will be called upon to discharge his time will be completely occupied in India. If he fulfil those duties with fidelity, he will have little opportunity for the study, with that assiduity which is necessary to secure success, of subjects not particularly interesting or inviting in themselves

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and for which he may have had no previous, or, at least, mere preliminary preparation. It is true that the young civilian will have to pass one or two examinations previous to his being entrusted with the discharge of any duties of importance; but as these examinations are of the most elementary character, the degree of study necessary to enable him to pass them is insufficient to lay that foundation upon which a solid superstructure can be built. Probably the circumstance of having passed an examination may lead the student to imagine that the knowledge he has acquired is perfection; if such should be the result of his success, farther progress can scarcely be hoped for.

The two great branches of law which the Indian civilian and the Indian barrister will find most difficult, are the Hindoo and Mahommedan. With the Mahommedan, or any other branch of Indian law, we have at present no concern. The work now offered to the public is intended to set forth the doctrines of the Hindoo law; and before adverting to our object in undertaking the task, we shall endeavour to render as clear an account as possible of the various schools of law, and the sources from which a knowledge of these doctrines can best be obtained.

The Hindoo law is, as we have before remarked, divided into five schools, differing in some respects from each other, but not to the extent that is generally imagined. The Bengal school is called the Gauriya. Its leading authority is the "Daya Bhaga" of Jimuta Vahana, a treatise of great repute among the lawyers of Bengal. In doctrine, where a difference exists, it is opposed to those of the "Mitacshara," the great treatise of the Benares school. Both works have been translated by Colebrooke, a Bengal civilian, and famous Sanscrit scholar. He carefully annotated them from the writings of various commentators. The "Daya Krama Sangraha," a compendium of the law of inheritance by Srikrishna Terkalankara, is another work held in high estimation in the Bengal school. It was translated by Mr Winch, and is one of the principal commentaries to which Colebrooke was indebted for his annotations on the "Daya

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Bhaga." The Digest of Hindoo Law on contracts and successions, with a commentary by Jugganatha Tercapanchanana, was likewise translated by Colebrooke, and is another authority referred to by all schools as containing a collection of texts not easily obtained in any other work; but the book itself, and the peculiar views entertained by the commentator, are considered of greater weight in Bengal than elsewhere.

The "Mitacshara" is the leading authority in the school of Benares. The range "of its authority and influence," says Colebrooke in his preface, "is far more extensive than that of Jimuta Vahana's treatise; for it is received in all the schools of Hindoo law, from Benares to the southern extremity of the peninsula of India, as the chief groundwork of the doctrines which they follow, and as an authority from which they rarely dissent." It is a gloss on the Institutes of Yajnavalchiya, a work of considerable antiquity, supposed to have been written earlier than the second century of our era. The "Mitacshara," also called the *Vignyaneswareum*, from its author, Vignyaneswara, would appear to be so intimately associated with the Institutes of Menu, that both works are frequently cited together as *Menu Vignyaneswareum*. Colebrooke infers that its age exceeds five hundred, and falls short of a thousand years. "The works of other eminent writers* have," observes Morley, "concurrently with the 'Mitacshara,' considerable weight in the schools of law which have respectively adopted them; but all agree in referring to the authority of the 'Mitacshara,' in frequently appealing to his text, and in rarely, and at the same time modestly, dissenting from his doctrines on particular questions. The 'Mitacshara' must thus be considered as the main authority for all the schools of law, with the exception of that of Bengal."

The doctrines of the Mahratta school are contained in the "Vyavahara Mayukha," by Nilakantha, supposed to have been written about two hundred years ago. This work is considered among the Mahrattas concurrently as an authority with the "Mitacshara," though it would appear sometimes to be opposed to it. It has been translated and annotated by Mr Borrodaile of the Bombay civil service.

* Referred to under title, "Sources of the Law."

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The "Vivada Chintamani" represents the doctrines of the Mithila school. The author, *Vechaspatimisra*, is stated to have written at about four hundred and fifty years ago. It has been translated by the Hon. Prosseno Coomar Tagore of the Bengal legislative council. It follows the doctrines of the "Vivada Ratnakara," a general digest compiled at a much earlier date.

In several points the "Chintamani" coincides with the "Mitacshara," which, being a commentary on the Institutes of Yajnavalchiya, was held in high estimation by the jurists of Mithila, and exercises an influence among the followers of that school.

The Dravada school is represented by the "Smriti Chandrika," which is the production of Davanna Bhut, the author of the "Dattaka Chandrika." The "Smriti Chandrika," was translated by T. Kristna Sawmy Iyer, a principal Sudr-Ameen in the Madras presidency. It is certainly an authority in the Dravada school, and derives its doctrines from the "Mitacshara," from which, as may be expected, it differs in a few points, Yajnavalchiya being the authority on which the doctrines of the Benares school are founded. Where commentators differ, the original source from which they themselves have derived their inspiration ought to be the referee to decide between them. In the course of the present work the reader will remark that we have had occasion to notice the conflict of opinion between the "Smriti Chandrika" and the "Mitacshara." In those instances where we have examined their difference with attention, we have observed that the sages, or original authorities, supported the views of the "Mitacshara," and that Davanna Bhut in one instance in particular failed to notice the subject which, upon his authority, was decided by the judges of the High Court of Madras in a manner not in accordance with the hitherto universally received construction of the Benares school, (see page 181.) We are not aware what knowledge of the Sanscrit Mr Kristna Sawmy Iyer may possess. In Madras, however, according to our information, Sanscrit is a language which is not studied to that degree of perfection

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which would enable a student to obtain a familiarity with it. In making this observation, it is not our intention to disparage the erudition or the labour of the learned translator. Probably his knowledge of the language may be exceptional; but when we find for the first time a work hitherto inaccessible to the English reader ushered into the presence of the legal public from one foreign language into another by a gentleman to whom both languages are equally foreign, we are naturally led to ask, Have we a guarantee for the correctness of the translation?

The translator says, "Notwithstanding my utmost endeavours, I was unable to get a printed copy of the "Smriti Chandrika" in Sanscrit. I was hence obliged to furnish myself with several manuscript copies in Sanscrit from different quarters, such as Tangore, Madras, and Mysore. They were, of course, found to contain several clerical errors, and exhibited in some instances even inconsistent readings. I compared all the copies together with the assistance of learned shastras, and prepared at first a correct manuscript copy, trying at the same time to rectify all that appeared to me to be apparent clerical errors, and adopting such of the readings as were found more agreeable to the context."

We do not see that this statement of the translator is of a very satisfactory nature. We know not whether the "clerical errors" and "inconsistent readings" have relation to subjects important or immaterial, agreeing or conflicting with the authorities of the school of which Davanna Bhut was a follower. We know not who these learned Shastras are of whose assistance the translator availed himself—whether they were acquainted with law, or whether they really understood Sanscrit, and were competent to occupy a place in a committee convened for the purpose of preparing a new copy of the "Smriti Chandrika." The translation has not been prepared from an authentic, genuine, undoubted copy, but from a copy compiled from "several," "containing several clerical errors," and "inconsistent readings." We imagine that the translator might have easily saved himself from these observations, had he sought in the Government collections of Madras

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or Bengal for a genuine copy. And if he had found the difficulty of reconciling "clerical errors" and "inconsistent readings" insuperable, we think it was the duty of a candid translator to insert in his translation not only those "clerical errors" and "inconsistent readings," in order that the practitioner or the judge might have an opportunity of deciding for himself in what manner these "clerical errors" and "inconsistent readings" ought to be rendered. The learned translator has undertaken this task, and has no doubt executed it satisfactorily to himself. We should have been more obliged to him had he not saved us this trouble; as it is, we know not what is the authentic text of "Davanna Bhut," nor how far the text has been altered by the industry of the translator. We have considered it our duty to call attention to this work as we find it differs in so many important particulars from the "Mitacshara," and we are afraid it will lead to various innovations if the doctrines which according to the present translation of the "Smriti Chandrika" are genuine, are not minutely scrutinised.

We must notice two other works, the "Dattaka Mimansa," and "Dattaka Chandrika," which are devoted to the subject of adoption. The former is the production of Nanda Pandita, the author of a commentary on the "Mitacshara." The latter was composed by Devanna Bhut, the author of the "Smriti Chandrika." Both were translated by Mr Sutherland. The doctrines of these books vary in some points, but it is asserted in the judgment of the High Court of Madras, in the great Ramnad case, that "where they differ, almost all the schools follow the 'Dattaka Chandrika' in preference to the 'Dattaka Mimansa.'" But see *W. H. Macn.* Pref. xxiii.; *Chintemani*, Pref. xxvii. We may conclude that those are received as authorities on the subject of adoption by all the schools. It would, however, appear from Mr Borrodaile's preface to the "Vyavahara Mayukha," that in 1827, the period of the publication of his translation, neither of these works existed in the original in the Bombay Presidency; that in consequence of the pundits being unacquainted with them they followed the doctrines of the "Mayukha" on

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the subject of adoption. We shall close our remarks on the Hindoo treatises on Hindoo law by a reference to Menu's Institutes, the great fountain of that law. This celebrated book has been translated by Sir W. Jones, and edited by Mr, afterwards Sir Graves Haughton. It is the original source of law, unfitted, however, in its entirety to be followed at the present day. Making due allowance for the tincture imparted to its legal doctrines by the religious element which has influenced other codes as well as the Hindoo, we consider that its strict legal principles will, in respect of justice and equity, bear a favourable comparison with any other code of laws of similar antiquity.

We have abstained from referring here to other authorities which have not been translated.* Those to which we have alluded are original works of Hindoo authority, accessible to the English reader, referred to daily in our courts, and with the exception of the "Smriti Chandrika," which is but a recent production, received as safe guides.

Several Europeans have written works of authority on the subject of Hindoo law. In Bengal, Sir Francis Macnaghten, one of the Justices of the Supreme Court of Calcutta, in the year 1824, published a treatise entitled "Considerations on Hindoo Law," which exhibited great research, and a sincere desire to arrive at a knowledge of its true principles. It may, however, be regarded more as essays and notes than as a complete treatise on the subject of Hindoo law. Mr W. A. Macnaghten, of the Bengal civil service, published a treatise in 1828, entitled the "Principles and Precedents of Hindoo Law," in two vols. This is a production of deserved celebrity; it points out the distinction between the Bengal, Benares, and Mithila schools, and has been always held in great estimation.

Mr Sutherland, the translator of the "Dattaka Mimansa," and the "Dattaka Chandrika," published a synopsis on the subject of adoption, but it is greatly to be lamented that that gentleman did not employ his knowledge in composing an original treatise on the subject.

* See an enumeration of them, post, p. lix., "Sources of the Law."

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Mr Elberling, of the Danish Civil Service, has published a succinct, and at the same time comprehensive treatise on Hindoo, Mahommedan, and other laws administered in India. The part devoted to Hindoo law draws a clear distinction between the Benares and Bengal schools, and, if for no other reason, for that alone, would merit the attention of the student.

Sir Thomas Strange, Chief-Justice of the Supreme Court of Madras, was the first English writer who published an original treatise on the subject of Hindoo law. If we consider the few sources to which he had access, the chaos of confusion in which the peculiar style of Hindoo legal writers envelop their meaning, the few original authorities at that time translated, his own ignorance of the country languages, we cannot but be struck with admiration at the clearness and perspicuity which he has succeeded in imparting to his work. In the words of a well-known writer, he found her a cold statue, and breathed into her life and vigour.

Glad as we are to pay this tribute to the industry of this great writer, we have been compelled in the course of the following work to differ in certain particulars from his views, but in expressing our own, we do so with diffidence.

Mr Justice Strange, late of the High Court of Madras, has worthily followed in his father's footsteps. He is the author of a manual on Hindoo law, which was held in the highest reverence in the Madras Presidency until the amalgamation of the Courts. But since then it has declined in authority. We do not agree with those who consider this work to be of no merit. On the contrary, we are of opinion that it possesses much. It is true it contains a few errors, but these might easily be removed in a subsequent edition. But those, to which any judge, whatever be his learning and ability is liable, form no grounds for the violation of the rules of propriety or for that want of good taste which has been exhibited in the wholesale condemnation of this work. From Mr Justice Strange's writings we are led to infer that he was deeply imbued with the principles of Hindoo law, derived from their original source, as they would be administered in a primeval state of

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Hindoo society, uncontaminated by the admixture of foreign influence, whether pretending to be actuated by construction of what the law should be or with reference to modern progression. It is in this spirit, we think, that the legislature intended, when securing to the Hindoos the enjoyment of their laws, that the law should be administered. Doubtless, in many respects the Hindoo law, like other systems, is childish, senseless, or purposeless ; but where these defects exist, reformation should come from the Legislature, not from the Bench. When the Bench arrogates to itself the power of setting aside the law, we consider it then assumes a jurisdiction which was not conferred upon it. It may be very well, in objection to Mr Strange's views, to observe, they are opposed to the existing state of things. Such an observation may be just, but if the law says otherwise, surely the writer who enunciates the law is not in error. The Legislature may be called upon to interfere, and perhaps if the whole Hindoo law were placed in the legislative crucible and recast, a more satisfactory result might ensue than the uncertainty which exists at present. Whatever may have been the demerits of Mr J. Strange and his system, the public have the satisfaction of knowing that the principles of the Hindoo law, whether rightly or wrongly enunciated, had a chance of being uniformly administered. But at present the public know not upon what principles to proceed—change of administration has produced such a desire to demolish old things and to build up new, that they know not what image they are to worship.

After this Treatise had been printed we received two books published last year, one by Mr Reginald Thomson, Pleader of the Zillah Court of Tinnevelly, which is based on the plan of Mr Justice Strange's Manual, and professing to avoid the errors into which he had fallen. The other is entitled "A Digest of Hindoo Law," from the replies of the Shastras of the Bombay Presidency, by Mr West of the Bombay Civil Service, and Professor Bühler: the latter a work undertaken by authority, and one which we have no doubt will be found extremely useful.

It has been the custom, we may say a time-honoured

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one, because it is of some antiquity, to abuse the Pundits, to accuse them of corruption, ignorance, and imbecility. But it will be observed that few of those who have had much intercourse with them indulge in their condemnation. The Pundits have borne most patiently the abuse so often heaped upon them; their patience, and the circumstance of no defence having been put forward, might lead to the conclusion that they admit the justice of the impeachment. If they understood the language of their traducers some ground might exist to justify this opinion; but as the Pundits understood no language except their own and Sanscrit, they are in a blissful state of ignorance of what has been said behind their backs. Lawyers sometimes differ with respect to the application of the law to the same state of facts. Even judges disagree as well as practitioners. Reasons are sometimes given which are unsound; conflicting opinions are frequently offered upon similar subjects. Would any Englishman be justified in saying, that under all these circumstances he could only conclude that English barristers and English judges were corrupt, ignorant, and imbecile. The Pundit has a short question put to him, either written or verbal, requiring him to state the law on the facts set forth. His reply is equally concise, and contains in many cases reference to his authority: perhaps the answer may be erroneous. Does an English barrister always give a correct opinion? and because the answer may happen to be erroneous, if he be neither ignorant nor imbecile, is there sufficient ground to conclude that he must be corrupt? Let us test ourselves by this standard, and we should not stand so high in our own estimation as we do at present. Amongst the thousands of Pundits who have held office in India, no doubt thousands of erroneous opinions have been given. If the opinions of a similar number of English lawyers were examined, would the ratio of error be less? We doubt it. It was too much to expect perfection from the Pundits, although we may complacently conclude that we possess that quality ourselves; and much as the Pundits have been abused, we observe from the Bombay Digest, that the Judges of the High Court and the Gov-

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ernment of that Presidency have considered it desirable to perpetuate their opinions, and for that purpose consigned the labour of selection to men duly qualified for the task. The Pundits were acquainted with Sanscrit, and were able to refer to original sources of law, the greater portions of which, for the want of translation, are inaccessible to one who is merely an English scholar. Interwoven as their law is with their religion, the Pundits would understand its application more clearly and more readily than any one who had but a slight knowledge, if any at all, of Hindoo religious tenets or ceremonies. They were, therefore, better qualified to give an opinion than men ignorant of their language, and unacquainted with their religious tenets and ceremonies, whose knowledge was confined to half a dozen books not containing anything that had been written upon the subject, submitted for their consideration, or professing to clear up any difficulty that might arise. Among the Pundits, as among every other class of men, there have been some corrupt, some ignorant, and some imbecile; but how indignant would an Englishman in India feel if he were informed that because there were some of his countrymen corrupt, ignorant, and imbecile, the natives of the country considered all Englishmen to be of that stamp. So far from considering the reproach cast upon the Pundits to be well deserved, we think that it would be better if the Judges of the High Courts of Madras and Calcutta were to advise their respective governments to follow the example of the Bombay Presidency.

Since the period when Sir Francis Macnaghten, Mr W. H. Macnaghten, and Sir Thomas Strange wrote, the law has undergone such great changes in the construction placed upon its substantive parts, that the necessity for a work treating of the law as understood at the present day has arisen. Mr Justice Strange's Manual, small as it was, seemed, in the plenitude of its fame, to supply the requirements to a limited extent. But since the superstructure erected by Mr Strange has been shaken to its foundation, no work calculated to meet the requirements of the public on a complete scale, bringing down the law to the present time, has been published. The

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author has, therefore, endeavoured to compile a book which will set forth not only the texts and expositions of Hindoo sages and glossators, but also the construction placed upon doubtful texts by judges of the Sudr, Supreme, and High Courts of India, and their Lordships of the Judicial Committee of the Privy Council. In making a selection the task was of course very laborious, occupying some years, and on some few points he saw occasion to differ from opinions recorded in elaborate and well-considered judgments of judges of acknowledged learning. Where he has done so, he has given his reasons with deference and respect, and it will be for the reader to determine whether he has been justified in the view he has taken or not. The author has deemed it advisable to quote the judgments of the High Courts and Privy Council at greater length than he would have done had he not reason to believe that the reports of one presidency are not usually in circulation in another. Students, moreover, cannot be expected to be supplied with the reports, and many of the poorer classes of practitioners in the Mofussil are unable to procure them. The author has had great difficulty to encounter, in obtaining the reports of the various Presidencies. He was under the impression that he could have had access to the reports of all the Presidencies down to the present day in one or other of the public libraries in London, but he has been disappointed. Had he been able to consult the judgments of the various Courts from the earliest period, this work would have left his hands with greater satisfaction to himself. He has confined himself in the present compilation to the Law of Inheritance, and the various subjects arising out of and connected with it; reserving for separate publication, at a future period, the Hindoo Law of Contract.

The author has found much difficulty in adopting any clear and intelligible or systematic principle in spelling Hindoo proper names. In no work on Hindoo law which he has perused has he found any uniformity adopted, and almost all writers spell the same names differently. In some instances the author has followed previous writers, whilst in others, in order to convey the correct pronunciation to the student, he

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has adopted the orthography which the sound or pronunciation suggested.

Before concluding these remarks he wishes to express his acknowledgments to Mr George E. F. Shadwell of the judicial department of the India office; and to Dr Hall, the learned librarian, and Mr George Miller, sub-librarian at the East India library, for the courtesy with which they afforded him access to works which were not otherwise procurable.

5 Essex Court, Temple,
January 1, 1868.

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SOURCES OF THE LAW.

Sruti and Smriti.—The Hindoos believe their laws, both civil and religious, to be founded on revelation, a portion of which has been preserved, as they believe, in the very words revealed, and constitutes the Vedas, and are esteemed by them as sacred writ. They concern religion chiefly, and are termed *Sruti*, that which is heard or revealed, or traditional law. Another portion is termed *Smriti* recollection, (remembered law,) in contradistinction to *Sruti*, 1 *Stra. H. L.* 315, *Coleb.; Stra. Man. H. L.* § 1; 1 *Morl. Dig.* clxxxviii.

The *Smritis* comprise forensic law, or the *Dharma Shastra*, and are believed to be recorded in the very words of Brahma. The Vedas contain but few passages directly applicable to jurisprudence.

The *Smritis* or *Dharma Shastra* are the original text-books of the law. The law, civil and criminal, is to be found in the *Smritis*. Although a portion relates to religious observances, yet when *Dharma Shastra* is spoken of, forensic law is more particularly understood.

Authorities of Hindoo law.—The *Dharma Shastra* or forensic law is to be found primarily in the institutes or collections (sanhitas), *Smritis* or text-books attributed to holy sages under the assumed names of *Menu, Yajnavalchya, Vishnu, Parasara, Guatama*, &c., which are implicitly received by Hindoos as authentic works of those personages. The number of sages reputed to be authors is great, varying from eighteen to thirty-six, and even more. On these, glosses and commentaries and digests have been written, embracing the whole system of law, or portions thereof. These two latter

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sources of information are termed *Vyakhyana* and *Nibandhana Grandha*, *Stra. Man. H. L.* ch. i. § 2.

Of the institutes, those of *Menu* are of the highest authority, and earliest in date. As we have seen, the work has been translated by *Sir W. Jones* and Mr, afterwards *Sir Graves Haughten*, *Introduction* xiv. The other *Smritis* resemble that of *Menu* in form and doctrine, but none are now entire save *Menu's* work. *Menu* is the authority for the earliest age, or the *Kriti Yuga*, and each of the other *Yugas* has its appropriate *Smriti*. *Mr Strange*, ch. i. § 3, says, "Usage has, however, interfered with the precepts of the *Smritis*, and time has rendered their language obscure." Hence the commentaries and digests are now looked to as the true expositories of the law.

Five schools of law.—These commentaries have given rise to the five schools of law now prevalent in India, in consequence of the preference given to each. As we have seen in the introduction to this work, these schools are the Gauda or Bengal, the Midhila (Mithila) or that of North Behar, that of Benares administered in Calcutta, the Mahratta law, (Bombay,) the Dravada, (Deccan or Madras,) to which may be added that of Canara and Malabar, *Macnaghten*, *Strange*, *Strange, J.*, *Morley's Introduction.*

Diffference in the schools.—These schools differ but little from each other, with the exception of Bengal, where, upon inheritance, the law varies from the other schools, 1 *Morl. Dig.* clxxxix.-cxci.; *Stra. Man. H. L.* ch. i. § 4.

Mr J. Strange, Man. H. L., § 5, says, "The school of Benares is the foundation of the Midhila, Mahratta, and Dravada schools." Thus the interpreters of the law are ranged under two great divisions—that of Bengal and that of Benares. In the Bengal school the letter of the law is modified by inferential reasonings, while in the Benares school the text is more closely followed.

Mr Morley, 1 *Dig.* clxxxix., says, It would be almost impossible to define with accuracy the limits of these several schools, nor indeed is there that distinction between them which some suppose. The Bengal, it is true, stands nearly alone, particularly with regard to the law of inheritance, in

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which there is a wide difference in doctrine between the northern and other schools, the latter receiving some treatises in common which are totally rejected by the Gauriya lawyers. The Bengal school assimilates in some respects with that of Mithila—inheritance, however, being still excepted.

Looking to west and south of India, the main distinction between the Benares, Mahratta, and Dravada schools is in fact rather a preference shown by each respectively for some particular work as their authority of law, than any real or important difference of doctrine.

In all western and southern schools the prevailing authority is the almost universal *Mitacshara*; and although the Mahrattas may prefer the *Mayukha* to the *Madhaviya*, and the contrary may be the case in the Karnata country, whilst in other districts other treatises are referred to; still the law itself, even in regard to inheritance, is essentially the same throughout southern India. We have referred in the introduction to the extent and situation of the districts where the doctrines of the several schools are current. We shall here more particularly define the limits of those schools; having endeavoured to delineate them with as much accuracy as practicable in the map prefixed to this work, which may be found useful, and will no doubt serve all ordinary purposes.

The Gauriya or Bengal school of law prevails over the province of Bengal proper, and is co-extensive with the Bengali language.

The Mithila school includes North Behar or Tirhoot.

The Benares school prevails in the city and province of that name, and is the school of Middle India. The doctrine of this school is current in Orissa, and extends from Midnapore to the mouth of the Hooghly, and thence to Cicacole.

The Maharashtra school governs the law in the Mahratta country. The south limit of that country passes from Goa through Kolapoore, and Bidr to Chandra; the eastern line follows the Warda river to the Injadri or Satpoora Hills south of the Nerbudda, and which form its northern limit as far west as Nandod. The western boundary may be marked

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by a line drawn from Nandod to Daman, and thence along the sea-coast to Goa. The Maharashtra school prevails wherever the Mahratta language is spoken by the natives.

The Dravada school consists of the whole of the southern portion of the Peninsula, but it may be subdivided into three districts, in each of which some particular law treatises have more weight than others; these districts are, Dravada, Karnataka, Andhra. Dravada proper is the country where Tamil is spoken, and occupies the extreme south of the Peninsula, its boundaries may be traced by a line drawn from Pulicat to the Ghats, between Pulicat and Bangalore, and then following the Ghats westward, and along the boundary between Malabar and Kanara to the sea, including Malabar. The Karnataka is bounded on the west by the sea coast as far as Goa, thence by the Western Ghats up to Kolapur; to the north by a line from Kolapur to Bidr, and on the east by a line from Bidr through Adoni, Anandpur, and Nandidrug, to the Ghats between Pulicat and Bangalore; here the Karnataka language is spoken. The third district, Andhra, where the Telinga or Telugu is spoken, extends from the boundary line last mentioned, and which, prolonged to Chandra, will form its western limit; on the north, it is bounded indistinctly by a line running eastward to Sohunpur, or the Mahanaddi river, and on the east by a line drawn from Sohunpur to Cicacole, and thence to Pulicat, where the Tamil country begins.

These are the limits of the various schools of law, as far as they can be approximately defined.

HINDOO LAW BOOKS.—The *Dharma Shastra* may be divided into three classes—

1. The *Smriti*, or text-books, which are the foundation of all Hindoo law, and which are attributed to various rishis, or sages, who are supposed to have been inspired. They are all, with slight variations in form and doctrine, the same with the *Institutes of Menu.*

2. The *Vyakhyana*, or glosses and commentaries on these *Smritis*, many of which partake of the nature of digests.

3. The *Nibandhana Granda*, or digests properly so called, either of the whole body of the law, or of particular portions

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thereof collected from the text-books and their commentators.

Those works by European authors, may be added. We have already referred to them in the "Introduction."

The *Smriti* text-books, institutes, or collections attributed to various rishis, are all divided into three kandas, or sections; the first, *Achara*, treating of religious ceremonies and daily observances; the second, *Vyavahara*, of law and the administration of justice; and the third, *Prayaschitta*, relating to penance and expiation.

Those books are all venerated by the Hindoos as next in sanctity to the Vedas themselves.*

The *Manava Dharma Shastra*, or *Institutes of Menu*, the highest authority of memorial law, is universally allowed by the Hindoos, not only to be the oldest work, but also the most holy after the Vedas; and as in addition to this, the other text-books are, as it were, formed on the same model, it may be fairly considered as the basis of the whole present system of Hindoo jurisprudence. This work, as we have already said, has been translated by *Sir W. Jones*, *Sir Graves Haughten*, and an anonymous writer, and in French by *M. Loiseleur Deslongchamps.* These vary very little. They are all according to the gloss of *Koolooka Bhatta.*

Atri, the second writer of a text-book, according to *Yajnavalchya*, but who is not mentioned in the *Padina Purana*, composed a law treatise in verse, which is extant. *Vishnu* is also said to have written an excellent treatise in verse, and *Harita* one in prose. The *Yajnavalchya Dharma Shastra* (or *Institutes of Yajnavalchya*) comprises three books.

Colebrooke, *Dig. Pref.* xvi. *et seq.* 2d Ed., enumerates other *Smritis*, viz.:—

The *Institutes of Usanas* in verse.

A short Treatise by *Angiras.*

A short Tract by *Yama.*

* It must be observed that many *Smritis* are quoted by legal writers, which are no longer extant. It is said to be the opinion of the Brahmins that, with the exception of *Menu*, the entire work of no one of those sages has come down to the present time, *Col. Dig.* vol. i. p. 454, *Morl. Dig.* cxciv.

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A work in prose by *Apastamba.*

A metrical abridgment of the *Institutes of Samvarta.*

A Treatise by *Katyayana.*

An abridgment of the *Institutes of Vrihaspati.*

A work by *Parasara.*

Some works connected with law by *Vyasa*, the reputed author of the *Puranas.*

The joint work of *Sankha* and *Likhita.*

A Treatise in verse by *Daksha.*

A Treatise in prose by *Gautama.*

An abridgment in verse on penance and expiation by *Satatapa.*

A work in prose mixed with verse by *Vasishta.*

Mr Morley says, that the *Smritis* are mostly of small extent, relating to observances and ceremonies, and only incidentally touching upon law. The *Smritis* which are received in common by all the schools, are no longer *final* authorities. *Vrihaspati* says, "A decision must not be made by having recourse to the letter of written codes, since, if no decision were made according to the reason of the law, (or immemorial usage,) there might be a failure of justice," 2 *Coleb. Dig.* 128, 2d Ed. The *Manava Dharma Shastra* itself is indeed now regarded as a work to be respected rather than in modern times to be implicity followed, 1 *Stra. H. L. Pref.* xiii. For *final* authority, then, in deciding questions of law, recourse must be had to the commentaries and digests, *Morl. Dig.* cci.

Commentaries.—The commentaries which form the second great authority of Hindoo law, some are merely explanatory of the text, while others are regarded as final authorities; and these latter, together with the Digests, the third class of law books, are the immediate authorities for the opinions of lawyers in the respective schools where the doctrines they uphold may prevail, *Morl. Dig.* cci. Many of the commentaries on the *Smritis*, those for instance on *Menu's Institutes*, which are merely explanatory of the text—are not considered to be final authorities any more than the *Smritis* themselves; but others again, which by the introduction of quotations from other writers, and by interpreting and enlarging on the meaning of

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the author, partake so far of the nature of general Digests are referred to for the *final* decision of questions. The *Mitacshara* is a remarkable instance of this, since, though professedly a commentary on the *Smriti* of *Yajnavalchya*, it is consulted as a final authority over the whole of India, Bengal alone excepted.

The *Manava Dharma Shastra* has been the subject of several commentaries. Amongst these the most celebrated are by *Midhatithi*, son of *Virasvami Bhatta;* the comment by *Govinda Raja;* another by *Dharanidhara;* the famous gloss of *Koolooka Bhatta*, entitled *Manvartha Mooktavali.* It is a commentary on *Menu*, and is held in the highest repute of any.

In addition to these, *M. Deslongchamps* mentions, that in preparing his edition of the Institutes, he made use of one by *Raghavananda*, entitled *Manvarta Chandrika*, which he states to be, in many instances, more precise and clear than *Koolooka. Bhaguri* is also said to have written a commentary on the *Manava Dharma Shastra. Steele* mentions two other glosses on *Menu*, as known among the Mahrattas—the *Madhava*, by *Sayanacharya*, which is stated to be of general authority, especially in the *Carnatic;* and the *Nandarajkrit*, by *Nandaraja. Colebrooke* mentions another commentary on *Menu*, *Morl. Dig.* cciii. These are all merely explanatory of the text, and must not be considered as final authorities. The commentary on the *Institutes of Vishnu*, entitled, *Vaijayanti*, written by *Nanda Pandita.* The copious gloss of *Aparaka* is supposed to be the most ancient commentary on the *Institutes of Yajnavalchya*, and to be therefore earlier than the more celebrated comment on the same text. The *Mitacshara* of *Vijnaneswara* is, as we have observed, a gloss on *Yajnavalchya Dharma Shastra.* It abounds with apposite quotations from other legislators, and expositions of those quotations, as well as of the text which it professes to illustrate. *Vignyaneswara* follows the arrangement of *Yajnavalchya Dharma Shastra.* It is divided into three parts, or kandas—viz., the *Achara Kanda*, which treats of social and religious duties; the *Vyavahara*

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Kanda, which treats of jurisprudence, or the laws of the people, that is, of private contests and administrative law; and the *Prayaschitta Kanda*, which treats of penance, devotion, and purification.

The *Mitacshara* is one of the greatest, and if we take into consideration the extent of its influence, the greatest of all the Hindoo law authorities, for it is received, as *Colebrooke* observes, in all the schools of Hindoo law, from Benares to the southern extremity of the Peninsula, as the chief groundwork of the doctrines which they follow, and as an authority from which they rarely dissent, *Morl. Dig.* cciv.

The works of other eminent writers have, concurrently with the *Mitacshara*, considerable weight in the schools of law, which have respectively adopted them, as the *Smriti Chandrika* in the south of India. This is a treatise on judicature, by *Devanna Bhut*, and is a work which *Colebrooke* considers of uncommon excellence. It is an especial authority in the Madras school, and stands next in estimation to the *Mitacshara*. It differs, however, in some few points from the doctrines of that work. *Mr T. Kristnasawmy Iyer* has recently published what professes to be a translation of it. See Introduction, p. xi.

The *Vivada Chintamani*, recently translated by *Mr Prossonas Coomar Tagore;* the *Ratnacara* and *Vivada Chandra* are authorities in Mithila.

The *Viramitrodaya* and *Kamalakara* in Benares.

The *Vyavahara Mayukha* in the Mahratta country.

All, however, agree in deferring to the *Mitacshara*, in frequently appealing to its text; and in rarely, and at the same time, modestly dissenting, from its doctrines on particular questions, *Colebrooke*, *Morl Dig.* cciv.

The *Mitacshara* must then be considered as the main *authority for all the schools of law, with the sole exception of that of Bengal.*

As the *Mitacshara* is a commentary on *Yajnavalchya*, so the *Mitacshara* has in its turn been commented upon by others. *Colebrooke* refers to four, and describes two; one the *Subodhini*, by *Visvesvara Bhatta*, and the other by *Balaam*

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Bhatta. The former is a collection of notes illustrating the obscure passages concisely but perspicuously. The latter is a running comment expounding the original word by word. The author follows the *Subodhini* as far as it extends, *Morl. Dig.* ccv.

Nanda Pandita is mentioned by *Mr Sutherland* as the author of a commentary on the *Mitacshara*, entitled *Pratitakshara*, *Sutherland* on "Adoptions," pref. p. 2.

Various editions of the *Mitacshara* have been published. The sixth chapter, which treats of inheritance, has been translated by *Colebrooke*, with notes and glosses from his own pen.

In addition to the commentaries already referred to, there are others by *Devabodha* and *Visvarupa*, and by *Sulapani*, entitled *Dipakalika*, in repute in the Gauriya school.

Yama's text-book in verse has been illustrated by *Koolooka Bhatta*, the author of the gloss on *Manava Dharma Shastra*.

Nanda Pandita wrote a comment on the *Parasara Smriti*.

The *Madhaviya* of *Vidyaranyasvami*, named after *Madhava Acharya*, the brother of its author, is an authority in the southern schools, but especially in the Karnataka. It is, in fact, a digest of the law prevalent in the southern portion of the Peninsula. *Vidyaranyasvami* was the virtual founder of the Vidyanagara empire, and his work became the standard of its law. It is of some authority in the Benares school.

Gautama's text-book was commented on by *Haradattacharya*, who resided in Dravada. His work is called *Mitacshara*, but must not be confounded with *Vijnaneswara's*. The *Varadarajya* by *Varadaraja*, is a general digest, but it may be placed among the commentaries, since it is framed on the *Narada Smriti*. It is of authority in the southern schools, especially in Dravada.

There is another commentary entitled, *Chatur Vinsati Smriti Vyakhya*.

The *Smriti Chandrika*, already referred to as a Mithila authority, is an authority in the Madras school, and has stood next in estimation to the *Mitacshara*. It differs, however, in doctrine from the *Mitacshara* in some few points.

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The *Saraswattee Vilasa*, by *Prathapa Roothroodoo*. The *Vyavahara Mayukha*, by *Neelakantha*, translated by *Mr Borrodaile*, is an especial authority among the Mahrattas. The *Madhaveum*, the *Mitacshara*, and the *Smriti Chandrika* are five works which are accounted of paramount authority, and are referred to as *Puncha Grandhi*, or five books, *Stra. Man. H. L.* ch. i. § 5.

Digests, or *Nibandhana Grantha* are the third chief authority of Hindoo law.

They are either general, or are confined to separate or distinct subjects of law, and consist of texts taken from the *Smritis* with explanatory glosses reconciling their apparent contradictions, 1 *Morl. Dig.* ccviii.

For the following summary of the digests, as indeed the preceding account of the original sources of the law, and the various commentaries upon them, the author is indebted to *Mr Morley*, who, in his Introduction to the first volume of his Digest, enters very fully into this branch of his subject.

Mr Morley adds, Several of them, in common with several of the glosses and commentaries above mentioned, are of less authority than others, and in many cases their names even may not often be heard in an Indian court of justice.

The *Dharma Ratna* of *Jim. Vahana* is a digest of the law according to the Guariya school. The chapter on inheritance, the celebrated *Daya Bhaga*, is the standard authority of the law in Bengal. It is on almost every disputed point opposed to the *Mitacshara*, and it is indeed on this very branch of the law—viz., inheritance—that we find the greatest difference in doctrine in the various schools.

Colebrooke translated *Jim. Vahana's* chapter on inheritance as well as that of the *Mitacshara*, with notes and comments.

The earliest commentary upon the *Daya Bhaga* is that of *Srinatha Acharya Chudamani*. The next is that of *Achyuta Chakravarti*, (author also of a commentary of the *Stradha Viveka*:) it cites frequently the gloss of *Chudamani*, and is quoted by *Mahesvara*.

The commentary by *Srikristna Tarkalankara* is the most

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celebrated of all the treatises on the text of *Daya Bhaga.* Another gloss bears the name of *Raghunandana. Ramanatha Vidya Vachespati* has also written a commentary on the *Daya Bhaga. Srikristna Tarkalanchara* has written an epitome of the law of inheritance, entitled *Daya Krama Sangraha.* This has been translated by *Mr Wynch.*

The *Smriti Tatwa* of *Raghunandana Vandyaghatiya,* the greatest authority of law in the Guariya school, is a complete digest of twenty-seven volumes. This great writer is often cited as *Smarta Bhattacharya.*

The *Daya Tatwa,* or that portion of the *Smriti Tatwa* of *Rhaghunandana,* which relates to inheritance, is highly spoken of by *Colebrooke.*

Kashirama has written a commentary on the *Daya Tatwa.*

The *Daya Rahasya,* or *Smriti Ratnavali,* by *Ramatha Vidya,* is of considerable authority in some districts of Bengal. It differs from *Jim. Vahana* and *Raghunandana,* and this tends to create uncertainty.

Dvaita Nirnaya of *Vachespati Bhattacharya,* a treatise on general law, and the *Daya Nirnaya* of the same author, which treats of inheritance, being little more than an abridgment of the *Daya Bhaga* and *Daya Tatwa,* are also Bengal authorities.

Kesava Misra, a native of Mithila, is the author of the *Chhandoga Parisishta* and the *Dvaita Parisishta;* the former, together with its commentary, the *Parisishta Prakasa,* are works of great authority, and treat of the duties of priests; the latter is a more general treatise.

MITHILA.—The *Vivida Ratnakara,* a general digest, compiled under the general superintendence of *Chandeswara,* Minister of Harasinhadeva, King of Mithila. The *Vivida Chintamani,* the *Vyavahara Chintamani,* and the other works of *Vachespati Misra,* are all considered of great authority in Mithila; as are also the *Vivada Chandra* and other treatises by the learned *Lady Lachimadevi,* who wrote under the name of her nephew, *Misaru Misra. Sri Karacharya* and his son, *Srinathacharya,* were also celebrated in the Mithila

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school of law; the former wrote a treatise on inheritance; the latter, the *Acharya Chandrika*, a text on the duties of the fourth class.

The *Smritisara*, or *Smrityarthasara*, by *Sridharacharya*, a treatise on religious duties, but mentioning civil matters incidentally, is according to the Mithila school; it quotes the *Pradipa*, *Kalpadruma*, and *Kalpalata*, works otherwise unknown.

There seem to be several *Smritisaras*. *Sir W. Macnaughten* mentions one by *Harinathopadhyaya*, which is of authority in Mithila. There is another by *Yadavendra*. The *Smriti Samuchchaya*, or *Smriti Sara Samuchchaya*, is also a Mithila authority, and is known among the Mahrattas.

The *Madana Parijata*, a treatise on civil and religious duties, by *Visvesvara Bhatta*, but containing a chapter on inheritance, is a Mithila work, and prevails also among the Mahrattas; it quotes the *Sapararka*, the *Smriti Chandrika*, and the *Hemadri*. The work was composed by order of *Madana Pala*, and is sometimes cited in his name. *Sir W. Macnaughten* calls the author *Madano Padhyaya*. *Sulapani* wrote a treatise on penance and expiation, which is an authority in Bengal and Mithila.

The *Viramitrodaya* of *Mitra Misra* is a treatise on *Vyavahara* in general, according to the doctrines of the Benares school, and systematically examines and refutes the opinion of *Jim. Vahana* and *Raghunandana*. The *Vivada Tandava* of *Kamalakara*, younger brother of *Dinakara Bhatta*, and son of *Ramakristna Bhatta*, defends the doctrines of *Vignyaneswara* in opposition to the writers of the Gauriya school.

The *Nirnaya Sindhu* is of authority at Benares and with the Mahrattas. It is by *Kamalakara*. It treats of rites and ceremonies, touching incidentally only on questions of a legal nature.

Neither *Mitra Misra* nor *Kamalakara* differ from the *Mitacshara* on any important point.

MAHRATTA SCHOOL.—The *Vyavahara Mayukha* of *Neelakantha* is the greatest authority, after the *Mitacshara* in this school, and is one of the twelve treatises by the same author,

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all bearing the title of *Mayukha*, and treating of religious duties, penance, and expiation. The *Mayukhas* are designated collectively the *Bhagavat Bhaskara*. The *Vyavahara Mayukha*, which is the sixth in the list, is devoted exclusively to law and justice, and is a general digest and collection of texts. *Mr Borrodaile*, as we before observed, has translated this work, to which he has added notes referring to passages on other works on Hindoo law.

The *Smriti Kustubha*, by *Anandee Deva Kasikar*. It is one of twelve works bearing the title of *Kustubha*, all of which are to be met with at Benares; it is known at Poonah, and treats of *Achara*, *Vyavahara*, and *Prayaschitta*.

The *Hemadri*, by *Hemadri Bhatta Kasikar*, is of authority in Bombay.

So is the *Dyot*, by *Gaga Bhatta Kasikar*. It consists of twelve divisions, and treats of all subjects.

The *Pursuram Prutap* is a general digest.

The *Prithi Chandroa* is also a general digest of *Achara*, *Vyavahara*, and *Prayaschitta*. The *Vyavahara Sakar*, by *Nagojee Bhatta*, is a work of general authority.

The *Sar Sangraha* is a work treating of *Prayaschitta Smarta*, *Vyavahara*, &c.

The *Madana Ratna*, by *Madana Singh*, is a treatise on *Achara*, *Vyavahara*, and *Prayaschitta*, of notoriety.

The *Achararcha*, by *Sunkur Bhatta Kasikar*, is a work on *Achara* and *Vyavahara*, of general notoriety.

The *Surasvati Vilasi*, a general digest, is one of the chief authorities, after the *Mitacshara*, in the whole of the southern portion of India. It was the standard law-book in the entire Andhra country, and is still of authority to the northward of the Pennar, where many customs exist, especially regarding land, which are derived from it. But even there the *Mitacshara* is of paramount authority.

The *Smriti Chandrika* we have already referred to. It is an authority in the Dravada school, and is, as well as the preceding work, of authority in the Andhra country.

The *Dharesvariya* is a general digest, and is an authority in the south.

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ADOPTION.—The *Dattaka Mimansa* of *Nanda Pandata* (whose other works we have already alluded to) is upon the subject of adoption.

The *Dattaka Chandrika* is also on adoption. It is of great and general authority, and is supposed to be the basis of *Nanda Pandita's* work. The *Mimansa* and *Chandrika* have been translated by *Mr Sutherland*. *M. Orianne* has translated the latter into French.

Mr Ellis, on the Law Books of India (pp. 21, 22), mentions works bearing the same names by other authors, as well as works bearing different titles, as general digests of the law of adoption.

On the law of adoption there is little difference in the several schools. The *Mimansa* and *Chandrika* are greatly respected all over India. Where they differ, the doctrine of the latter is adhered to in Bengal and in Southern India, while the former is relied on in the Mithila and Benares schools, (2 *Morl. Dig.* ccxxi.; 2 *Mad. H. C. R.* 214;) *Sir C. Scotland, C. J.* says, nearly all the schools follow the latter in preference to the former, where they differ, see *post*, p. 19.

Helayudha composed the *Nyaya Sarveswa*, the *Brahmana Sarvaswa* and *Pandita Sarvaswa*, and other tracts on the administration of justice and duties of caste.

Lakshmidhara wrote a treatise on the administration of justice, and also a digest called *Kalpataru*. *Narasinha*, son of *Ramachandra* wrote the *Govindarnava* and other law tracts.

Jitendriya is cited in *Mitacshara* and by *Jagannatha Tarkapanchanana*.

The *Vivadarnava Setu*, the *Vivada Sararnava*, and the *Vivada Bhangarnava* of *Jagannatha Tarkapanchanana* translated by *Colebrooke*, and commonly cited as the Digest, have been compiled since the establishment of the British in India under the auspices of *Warren Hastings* and *Sir William Jones*.

These three digests are commented upon and described by *Mr Morley*, 1 *Dig.* ccxvii.-ccxxi.

We may refer to the *Vyavestharatnamala* by *Sri Lakshmi Narayana Nyayalankara*. It is a catechism in the vernacular

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of Bengal. The principles advanced are supported by quotations in Sanscrit from works of authority. It contains a succinct view of the law of inheritance according to the doctrines of *Jim. Vahana* contrasted with those of the *Mitacshara*, together with a short treatise on Adoption.

Mr Morley (p. ccxxi.) recapitulates the works that are received as final authorities in the different schools excluding text books and explanatory comments—viz.,

BENGAL, OR GAURIYA.—Dharma, Ratna, Daya Bhaga, and its commentators; Srikrishna Tarkalankara and Srinatha Acharya Chindamani; Daya Krama Sangraha; Smriti Tatwa; Daya Tatwa; Vivadarnava Setu; Vivada Sararnava; Vivada Bhangarnava.

MITHILA.—Mitacshara, Vivada Ratnakara, Vivada Chintamani; Vyavahara Chintamani; Dwaita Parisishta; Vivada Chandra; Smriti Sara Samuchchaya Madana Parijata.

BENARES.—Mitacshara, Viramitrodaya Madhaviya; Vivada Tandava; Nirnaya Sindhu.

MAHARASHTRA.—Mitacashara, Mayukha, Nirnaya Sindhu; Hemadri; Smriti Kustubha; Madhavya.

DRAVADA (including the division of that name, that of the Karnataka and Andhra).—Mitacshara, Madhaviya, Sarasvati Vilasa; Varadarajya, Smriti Chandrika, Sarasvati Valasa.

The *Dattaka Mimansa* is preferred in Bengal and in the south. The *Dattaka Chandrika* in Mithila and Benares, *supra*.

The above works are quoted most frequently, but they do not include all that are cited by lawyers in the several schools. Nor are they *all* constantly referred to. In Bombay *Chief Justice Sausse*, in *Pranjeevandas Toolseydas* v. *Dewcooverbaee*, 1 Bombay, *H.C.R.* p. 131, *post*, p. 273, says that *Menu Mitacshara* and *Mayukha* are the authorities in that presidency (see *Bor. Bomb. Rep. Pref.* iii.), and in Benares the Pundits were required to consult the *Mitacshara*, and report the exposition of law there found applicable to the case. With the exception of the law of adoption, the works of the Bengal school are of no authority out of the limits where Bengali is the language of the people. But with this exception, there

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seems to be no reason why in the other schools the authorities should not be received indiscriminately.

We have already referred to the English authorities, it only remains to mention *Steele's* "Summary of the Law of Caste," printed by order of the Governor in Council of Bombay.

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HINDOO LAW.

Introductory Remarks.

Introductory remarks—The law of property and the family relation—Reserved by charters of justice for India—Collateral subjects where necessary discussed—The Hindoo law of inheritance hinges on the "family relation"—Subjects discussed.

The law of property and "family relation."—This treatise, as its title imports, embraces the Hindoo law affecting "Property and Family Relation," as administered in the "High Courts" at our presidencies in Madras, Bombay, Calcutta, and in the Privy Council.

Reserved by charters of justice for India.—This is one of the two great legal subjects of Hindoo law, which the Charters of Justice for India and local regulations have expressly reserved in extending the authority of English law over the natives; the law of contract being the other: as *Sir Thomas Strange* observes, in his *Introduction to Hindoo Law*, p. 7, imposing on the courts so created, whilst administering these subjects, the duty of adjudicating upon them, not, as in other cases, according to our law, but according to the law of the parties, as they happen to be Hindoo or Mahommedan, *Morl. Dig.* clxxiii., *et seq.*

By *Beng. Regulation*, 17th April 1780, sec. 27, it is enacted, "That in all suits regarding inheritance, marriage, and caste, and other religious usages or institutions, the laws of the Koran with respect to Mahommedans, and those of the Shaster with respect to Gentoos, shall be invariably adhered to." This section was re-enacted in the following year in the revised code, with the addition of the word "succession," 1 *Morl. Dig.* clxx.

In 1781, the declaratory act of 21 Geo. III., c. 70, sec. 17, enacted with reference to the powers and jurisdiction of the Supreme Court at Fort-William in Bengal, that in disputes between the native inhabitants of Calcutta, their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined in case of Mahommedans by their laws and usages, and in the case of Gentoos by their laws and usages, and where only one of the parties

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shall be Mahommedan or Gentoo, by the laws and usages of the defendant. In 1797 this was extended to Madras and Bombay, with the addition of the words, or by such laws and usages, as the same would have been determined by, if the suit had been brought and the action commenced, in a native court. See cl. 1, sec. 16, *Mad. Regulation* 111 of 1802.

Whenever in any civil suit the parties to such suit may be of different persuasions, when one shall be Hindoo and the other Mahommedan, or where one or more shall not be either, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled; in all such cases the decision shall be governed by the principles of justice, equity, and good conscience, it being clearly understood that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by these principles, *Bengal Reg.* of 1832; 1 *Morl. Dig.* clxxiii.*

COLLATERAL SUBJECTS WHERE NECESSARY DISCUSSED.—The discussion of these subjects will necessarily require a divergence from the main point into other collateral questions. Where a clearer elucidation necessitates such a course, we have found it convenient to follow the consideration of the incidental question, for the charters already referred to require, in administering their powers, a special regard to the constitution and usages of the natives of India.

THE HINDOO LAW OF INHERITANCE HINGES ON THE "FAMILY RELATION."—The Hindoo law of inheritance turns on the relative principle. The family relation is continually and prominently kept before our eyes. It is the connecting link in every branch of the Hindoo law of inheritance.

Questions on marriage seldom form the subject of litigation in Madras, owing, probably, to their submission to the head man of the village or caste. The placita cited in *Morley's Digest*, with one exception, relate to Bombay, 1 *Morl. Dig.* 287 n.; see 1 *Macn. Prins. H. L.* 57.

SUBJECTS DISCUSSED.—In this treatise we shall discuss the subject under its natural divisions, viz.—

I. Marriage.
II. Adoption.
III. Minority.
IV. Property, ancestral and self-acquired.
V. Charges on property.
VI. Disqualification for inheritance.
VII. Alienation *inter vivos*, and by will.
VIII. Succession.
IX. Partition.

* See "Introduction" to this work, where the regulations applicable to Bombay and Madras are referred to.

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CHAPTER I.

ON MARRIAGE.

Marriage forms the substratum of the whole order of civil life—Barrenness of parents—Marriage is compulsory—Eight species of marriage—Wedding rites accompany all marriages—Different rites where wife not a virgin—At the nubile age husband may claim wife—Period of marriage of males—Father bound to select husband for daughter—If he fail to do so, selection devolves upon her paternal relations, or mother, or the girl herself—Period of marriage of female—Return of presents on annulling the engagement—Stridhana—Marriage consists of two ceremonies—Betrothal and consummation—Betrothal absolute marriage—Mode of contracting marriage—Contract fixes the connubial relation—Rights thus created—Duration of union—Severance of—Infidelity—Husband not entitled to damages—Before betrothal—With whom the contract may be entered into—Caste or class—Soodra need not marry with same caste—Women cannot marry in lower caste—Illegitimacy is not an absolute disqualification for caste—Marriage with daughter of bastard—Loss of caste—If by a sonless female—If she have a son—Prohibited degrees—Younger brother or sister before elder—Adopted son—Causes of separation—Supersession or polygamy—Justifying circumstances—1st, Consent—2d, Legal causes—Presents on second marriage—Illegal supersession—Residence of first wife—Entitled to inherit—Residence of several wives—Personal chastisement of wife—Withdrawal of conjugal rights—Divorce according to Hindoo law.

Marriage forms the substratum of the whole order of civil life.—The subject of marriage is not only the first but the most important with reference to its bearing on property. It forms the *substratum* of the whole order of civil life. Great differences distinguish the Hindoo law of marriage from that of other countries, for, whereas elsewhere, as amongst Mahommedan nations, marriage is a civil contract merely, amongst Hindoos it is primarily a religious ceremony entered into for religious objects and ends, and affecting the religious state of the man both here and hereafter. To this relation appertains the power and obligation of the father with regard to his children, or if his marriage should prove unproductive—a result that frequently happens, in consequence of the disparity in many cases

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between the ages of the husband and wife—other collateral or subordinate relations arise, which will be referred to in the chapters on "Adoption" and "Succession."

Marriage is the great point to which all Hindoo law converges. No people attach greater importance to it than the Hindoos. It is indispensably necessary that there should be a son to perform obsequies or religious funeral rites, and to discharge ancestors' debts, spiritual and temporal.

BARRENNESS OF PARENTS.—These objects may be frustrated by the barrenness of the parents—a contingency of frequent occurrence, as already observed, arising from the disparity of age, in numerous instances, between the married people. But a device has been resorted to for the purpose of remedying this failure, which is of daily practice, viz.,—Adoption; a ceremony of especial import as regards inheritance, although that is merely a secondary consideration with Hindoos; the primary object being to save the soul from Put, or Hell, or a place of torment.

MARRIAGE IS COMPULSORY.—As marriage affects the religious state of the man, it is compulsory, not by judicial process, but in accordance with their own customs and usages. It is contracted at an immature age on the part of the woman, or rather infant. Its consummation, however, is postponed until the nubile age. But consummation is not necessary, as with us, to make the marriage valid, or to confer upon the wife all the rights and obligations of widowhood, should her husband die before her nubile age and he has taken her to his own home. The religious benefit to be derived from marriage necessitates the entering into the contract at an early age, in order to prevent the defeat of the religious object in view by premature death. If the wife die, the husband is bound to marry immediately, whereas a widow was not permitted to contract a second marriage until the passing of Act xxv. of 1856.

EIGHT SPECIES OF MARRIAGE.—The works on Hindoo law enumerate eight species of marriage, viz.:—The *Brahma*, the *Daiva*, the *Arsha*, the *Prajapatya*, which are appropriate for Brahmins, or the sacerdotal order, and are based upon disinterested motives.

The *Gandharva*, or love marriages.

The *Racshasa*, or forcible connexion, which were peculiar to the chetriyas or the military class, and are founded, the former on reciprocal desire, and the latter on conquest.

The *Ausoora*, which is appropriate for vysyas, or the mercantile body, and for

Soodras, or the servile class, wherein the consent of the person giving away the girl is obtained by pecuniary consideration, forbidden because of its sordid character.

And the *Paishacha*, or where the marriage may have been effected by fraud by taking advantage of the girl when asleep or otherwise off her guard, which is reprobated by all classes.

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Menu enjoins that the two latter, *Ausoora* and *Paisacha*, should never be observed, and *Sir Thomas Strange* (*H. L.* p. 43) cites the *Digest* to show that "at present the Brahma nuptials only are practised by good men, though it is admitted that the *Ausoora* and the rest are sometimes resorted to by others, and it is questionable whether any other form is now observed in Southern India. At all events, it is clear that the several castes are not confined to the form applicable to themselves, for a *Brahmin* may contract an *Ausoora* marriage, and a Soodra a Brahmin. Sudr Court in *S. A.* 193 of 1858, and these two seem to be the most usual form of marriage.

In the supreme court of Madras, evidence was given of a *yellatam* marriage, which was a qualified adoption of the bridegroom by the bride's father, and it seems admitted that some such custom prevailed, though its exact effect was not established.—*Vincaratnam* v. *Vincansonall*, *S. C.*, 2 and 3 Terms, 1824, *Ex relatione C. J. Sir. T. Strange*, p. 43, n. 7. But quære whether this is a distinct form of marriage.

WEDDING RITES ACCOMPANY ALL MARRIAGES —Nuptial or wedding rites, accompanying all classes of marriage, have the effect of distinguishing even the less approved from commerce purely illicit, to which otherwise the Gandharva and Racshasa might be assimilated, 1 *Stra. H. L.* p. 42.*

DIFFERENT RITES WHERE WIFE NOT A VIRGIN.—Should, however, the bride be known not to be a virgin the rite is a distinct one, the customary office, founded on the *Veda*, expressing that the virgin (meaning the bride) worships the generous sun in the form of fire, an invocation sufficiently denoting the exclusion of one who is not so, 1. *Stra. H. L.* p. 43. Marriage is celebrated with the ceremonies described by *Sir Thomas Strange*, p. 44. The essence of the rite consists in the consent of the man on the one hand, and the father of the bride, or whoever gives her away, on the other, *ib.*

AT THE NUBILE AGE HUSBAND MAY CLAIM WIFE.—A girl when married continues to reside with her own family until she reaches maturity, of which it is the duty of the mother to give notice, when her husband can claim her and remove her to his home, *Stra. H. L.* p. 37 ; 1 *Morl. Dig.* 288, § 11.

PERIOD OF MARRIAGE OF MALES.—There are certain rules laid down in *Menu* with regard to the respective ages at which men and women may marry, but which are seldom followed. *Mr Justice Strange*, in his *Manual on Hindoo Law*, says, § 24, the Brahmins, Chetriyas, and the Vysyas may not contract marriage until they have completed the age of studentship, the opening of which period is marked by the performance of Oopanayana or investiture with the sacred thread, and the close by a ceremony *Samavur-*

* Probably the Gandharva, the Racshasa and Paisacha forms were originally considered as marriages, with a view to save the character of the woman and legitimate the offspring.

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thana. For the soodras or servile class, who have no stage of studentship, there is no limitation of the time for marriage, *ib.*

PERIOD OF MARRIAGE OF FEMALES.—The proper time for betrothment of females, according to *Coollooca Bhattu,* (expositor of *Menu,*) precedes puberty, *Stra. H. L.* p. 36. *Menu* enjoins the betrothment, although the girl may not have attained the age of eight years, 1 *Stra. H. L.* p. 36. Girls are given in marriage at the age of two and upwards until maturity, *Stra. Man.* § 19. A Brahmin girl attaining maturity without having contracted marriage forfeits caste, *Stra. Man.* § 20.

The consent of both parents to the contract must be first had, 1 *Morl. Dig.* p. 287, § 1.

FATHER BOUND TO SELECT HUSBAND FOR DAUGHTER. — Every Hindoo father is expressly bound to select a suitable husband for his daughter at an age when she can have no idea of the object for which the contract has been entered into.

IF HE FAIL TO DO SO SELECTION DEVOLVES UPON HER PATERNAL RELATIVES.—If the father fail to make the selection the duty devolves upon a succession of paternal relatives, viz., the grandfather, uncle, male cousins, 1 *Stra. H. L.* p. 36; 2 *ib.; Coleb.* 28.

OR MOTHER.—And ultimately upon the mother. Practically she has the right of choosing after the death of the father, *Stra. Man.* § 22.

A contract by a brother with his mother's consent for the marriage of his sister is valid, according to caste *Dasa Morh Madaliya Banyan,* 1 *Morl.* 288, § 8.

When one of two united brothers died, leaving a widow and a daughter, but no son, the surviving brother has a right to contract the marriage of his niece in preference to her mother, and if the uncle had consented to the mother's contracting it, the marriage ought to have been celebrated at his house, *ib.* § 9.

OR THE GIRL HERSELF.—If, however, the selection be neglected by these relations to the prejudice of the girl for three years from the time when she becomes marriageable, that is, the attainment of eight years, she may choose for herself, *Menu,* ch. ix. 90, 91; 1 *Stra. H. L.* p. 36; *Stra. Manual,* § 23. Though the law be so, it may be a question whether, according to modern practice, the right does not in this case continue to attach to the substitutes for the father instead of vesting in the girl, 1 *Stra. H. L.* p. 36.

RETURN OF PRESENTS ON ANNULLING THE ENGAGEMENT. — If from any legal impediment, viz., incurable disease or other legal defect or consanguinity within the prohibited degrees, or from the death of the young woman, the marriage is not consummated; presents made to her *bonâ fide* as tokens of courtesy and pledges of affection, not as paid to her kinsmen for their own use by way of sale of her, which is forbidden, are to be returned, and in the latter case the expenses of both parties are defrayed by the gentle-

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man, 1 *Stra. H. L.* p. 38. If the breach be on the girl's side without discovery of legal impediment, *her* family must bear the expenses, *Stra. Man.* § 31.

A majority of the caste of Khumbaiti Morh Banyans declared that it was allowed by their customs to break off a contracted marriage by mutual consent or death, 1 *Morl. Dig.* p. 287, § 4.

A *Mangni* cannot be set aside in the caste Dusa Nagur Ahmadavadkar Banyans by the uncles of the female. Where they attempted to do so, the court referred it to the whole caste, the Mangni was declared to be valid, and the uncles were bound in penalties not to marry the niece to any other than the person to whom she was betrothed. The girl, however, was married to another, and the one to whom she was betrothed recovered damages for loss of character in the caste, *ib.* 287, § 4.

A breach of the contract is not permitted in the caste of *Khatris*, *ib.* 288, § 5.

Where A sued B to compel performance of a contract of marriage, B urged that a *Mangni* was dissoluble by the rules of their caste, (*Sonis,*) when either was unwilling to fulfil it. But after contradictory evidence, the Court decreed that B should proceed according to the contract to marry his daughter to A; the latter performing all the conditions to which he might be subject under it, *ib.* § 7.

Stridhana.—Those presents where the marriage had been completed constitute part of the woman's *stridhana*, or her peculiar property, 1 *Stra. H. L.* p. 38. See *post*.

Marriage consists of two ceremonies.—Marriage consists of two ceremonies. 1. Betrothal; 2. Consummation; between each there may be a long interval of years. The betrothal, as it is termed, is in fact, as well as in law, the marriage. Although the execution of the contract, or consummation, necessarily follows it, it is not essential to the validity of the marriage.

Betrothal is absolute marriage.—Betrothal, as commonly understood, is merely a promise of marriage to be carried out at some future period. But as the word is understood in English works on Hindoo law, it is, more properly speaking, an absolute marriage, so much so, that if a man dies before consummation the girl is entitled to all the rights, and incurs all the duties of widowhood, so that the death of the husband will not annul the contract. Formerly, she was debarred from contracting a second marriage with a different man, the Hindoo law prohibiting a girl from being more than once married. But see now Act xv. of 1856, *post*, p. 15. English writers, treating on Hindoo law, do not sufficiently mark the distinction between betrothal as a step preceding a marriage, and the ceremony of marriage.

Mode of contracting marriage.—For legal purposes the ceremonies legally prescribed and followed are almost, if not altogether, immaterial. In a civil point of view the only thing necessary

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is mere gift and acceptance. *Mr Strange*, in his *Manual*, § 28, says, that the only binding circumstance essential to the completion of a marriage are gift and acceptance of the girl, and the ceremony termed Sapthapathi, or the seven steps. The betrothment is effected by the bride and bridegroom walking seven steps, hand and hand, during a particular recital, and *Mr Strange's Manual of H. L.* § 28, says, sacrifices by fire (Homam) are of minor importance. The tying the Taly, or nuptial token, round the neck of the bride is a practice sanctioned by usage, but not prescribed in the Shasters or sacred books, so that the many ceremonies imposed by ancient law in these matters would seem to have been observed merely with a view of obtaining satisfactory evidence of the contract, and much less is now required, since the object of these many ceremonies is more easily attained; and if it can be shown that the contract was made, all the other ceremonies subside into very secondary importance. The contract, being perfected, may be enforced by the husband at the maturity of the girl, 1 *Stra. H. L.* p. 37; 1 *Morl. Dig.* p. 288, § 11.

CONTRACT FIXES THE CONNUBIAL RELATION.—The matrimonial contract in itself fixes the relation of the contracting parties as married, without the requirement of consummation, which does not take place until the girl arrives at the nubile age, when her husband takes her from her home to his. The *contract* draws the girl, in the event of her husband's death, into widowhood, with its attendant consequences, and gives her the right of inheritance, or maintenance in her husband's family, *Stra. Man., H. L.* § 29; 1 *Stra. H. L.* p. 171. But if her husband were divided, she, of course, would inherit as his heir, he leaving no male issue. See *post*.

RIGHTS THUS CREATED—DURATION OF UNION—SEVERANCE OF—INFIDELITY.—The only circumstance which the Court would consider a justification of the absolute severance of the contract of marriage is the adultery of the wife. The husband in such cases has the option either of absolute separation from his wife, or of superseding her by another, she still continuing to be legally connected with him. But in this latter case the adulterous wife is entitled in law only to a *starving maintenance;* the barest and smallest amount possible. According to Hindoo and Mahommedan law adultery is a crime in both parties. The Penal Code, however, makes it a crime in the man, but not in the woman. This is singular, inasmuch as the old Indian Regulations rendered adultery a crime punishable in the woman. The *Code Napoleon*, ch. 5, sec. 308, provides that the wife against whom separation of persons shall be pronounced for cause of adultery, shall be condemned by the same judgment, and on the requisition of the public prosecutor to confinement in the House of Correction during a fixed period, which shall not be less than two months, nor exceed two years.*

* It would conduce to morality if the crime were rendered penal in the woman as well as in the man.

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Husband not entitled to damages.—The husband is not entitled to damages from the adulterer; the Hindoo law not providing for discretionary damages upon any account, *Stra. Man. H. L.* p. 11, § 33. 2 *Stra. H. L.* 40, 44, 265 *C. and E.*: see 1 *Morl. Dig.* p. 288. But this is doubtful.

Before betrothal.—Previously, and up to betrothal, the contract rests legally in promise, which may be broken, subject to consequences as the breach can or cannot be justified, 1 *Stra. H. L.* p. 37. Breach of promise of marriage does not entail any special consequences, *Stra. Man. H. L.* § 30. According to Hindoo superstition an agreement for marriage would be lawfully determined on the part of the man by the occurrence of unfavourable auspices, as the meeting of a single Brahmin, or a cat, or a flight of birds, or the chirping of a lizard, when seeking a prosperous hour for the wedding, 1 *Stra. H. L.* p. 37. These events may prevent the completion of betrothment, and *Sir Thomas Strange*, *H. L.* p. 38, adds, many causes are enumerated, warranting as they respectively apply, retraction on either side.

With whom the contract may be entered into. — Another peculiar result of the religious character essential to the ceremony is, that a marriage may take place with a lunatic or an idiot, *a nativitate.* However immoral it may seem, the marriage with such a person, if made with the consent of his parents, is valid, and becomes binding. But if the lunacy come on after his birth, and the marriage take place during the lunacy, the marriage is good even though without family consent, *Dabychurn Mitter* v. *Radachurn Mitter*, 1 *Morl. Dig.* p. 290. This case is based on the opinion of the Pundits who cite no authority, see *Tirumamagal Ammal* v. *Ramusvami Agyangar*, 1 *Mad. H. C. R.* p. 214, where an idiot was held incapable of inheriting.

Caste or class.—As to the necessity for an equality of caste to constitute a good marriage, *Sir Thomas Strange* p. 40, says, that in the present era both parties must belong to the same caste, but the authorities quoted by him allowed the three higher castes to intermarry with the caste next below their own.

Soodra need not marry in the same caste.—It seems a Soodra need not marry a wife of the same sect or caste with himself, *Pandaiva Telaver* v. *Puli Telaver*, 1 *Mad. H. C. R.* p. 478.

Woman cannot marry in lower caste.—No woman can marry a man of a lower caste; such a contract is altogether illegal, the children are absolutely illegitimate, and consequently debarred from inheriting, 1 *Stra. H. L.* p. 40.

Illegitimacy is not an absolute disqualification for caste.—Hindoo law, independently of special usage or custom, does not make illegitimacy an absolute disqualification for caste, so as to affect in the relations of life not only the bastard but his legitimate children, *Pandaiva Telaver* v. *Puli Telaver*, 1 *Mad. H. C. R.* p. 478.

Marriage with daughter of bastard.—A Hindoo of a caste governed by the Shasters may contract a valid marriage with the

daughter of a bastard, *Pandaiva Telaver* v. *Puli Telaver*, 1 *Mad. H. C. R.* p. 478. Where a Zamindar married the daughter of a bastard, it was held that the Hindoo law, independently of special usage or custom, does not make illegitimacy an absolute disqualification for caste, so as to affect in the relations of life, not only the bastard, but also his legitimate children. *C. J. Scotland*, in delivering his judgment said :—" It is not, however, to be understood that supposing the late Zamindar and the second plaintiff (his wife) had been of different castes the marriage would, in my opinion, have been invalid. The general law applicable to all the classes or tribes does not seem opposed to marriage between individuals of different sects or divisions of the same class or tribe, and even as regards the marriage between individuals of a different class or tribe, the law appears to be no more than directory. Although it recommends and inculcates a marriage with a woman of equal class as a preferable description, yet the marriage of a man with a woman of a lower class or tribe than himself appears not to be an invalid marriage rendering the issue illegitimate, *Menu*, ch. 3, cl. 12, *et seq.; Mitacsh.* ch. 1, s. 11, cl. 2, and note ; 1 *Stra. H. L.* p. 40. According to this view of the law, there being no proof of special custom or usage, the marriage would be valid even though the parties had been of different sects or caste-division of the fourth or Soodra class."

Mr Justice Holloway said—" I have never entertained any doubt that the argument for the invalidity of the marriage drawn from the alleged illegitimacy of the woman's father is altogether unsound.

" That the son of a Soodra and of a woman between whom there had been no formal ceremony of marriage, inherits to the Soodra, is clearly shown from the authorities quoted in 9 *Moore's In. Ap.* p. 49, (1 *Sir W. Macn., H. L.* p. 18 ; 2 p. 15 *n* ; *Mitach.* ch. 1, s. 12; *Dáya-Bhága*, p. 151 ; *Dat. Miman.* s. 2, cl. 26 ; *Dat. Chand.* s. 5, cl. 30 ; 3 *Coleb. Dig.* cl. 24, p. 143 ; 1 *Stra. H. L.* pp. 69, 132, 2 *ib.* 168; *Vencataram* v. *Vencata Latchmee Ummal*, 2 *Stra. N. of Cas.* 305,) and the decision of the Judicial Committee that the illegitimate son of a Chetriya could not inherit went precisely upon the ground that the father was one of the twice born tribes. The whole tenor of the judgment shows that if the father had been a Soodra the son's right to inherit would have been unquestionable. It follows that a legitimate son of a Soodra is not an outcaste.

" Moreover, it is not invalid if it take place, because of the difference of class; as the twice born man is instructed to marry a wife of the same class with himself, the reasonable inference is that upon one not twice born the precept is not binding.

" Further, I am clearly of opinion that the classes spoken of are the four classes recognised by *Menu*, and not the infinite subdivisions of these classes introduced in progress of time. I think, therefore, that being a *Soodra* the woman was of the same class in the sense of the authority quoted.

" The argument, that because the parties went through an un-

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necessary religious ceremony, a marriage which would, if the ceremony had been omitted, have been valid, has by it been rendered invalid, seems to me to have nothing in reason to support it."*

The following opinions were given by the Pundit which, upon consideration, may be found to contain a great deal more than the court gives them credit for, and the soundness of the decision is very questionable.

Ques. 1.—Does the Hindoo law prohibit the marriage of a Hindoo with a woman of his own caste, where her father was illegitimate, and is such marriage valid or invalid?

Ques. 2.—Is the marriage of a Hindoo of the Maravar caste with a female of the Parivara caste legal under the Hindoo law?

Ans. 1.—The Hindoo law not only directs a man to espouse a wife of the same class with himself, but likewise forbids him to marry a female devoid of caste, or race. The child, male or female, begotten by him off his lawfully wedded wife of the same class with himself, of course belongs to the class of its parents. The son of a kept woman being one not so begotten cannot claim the class of his father, or mother, and his daughter, destitute as she is of caste, cannot be considered by a Hindoo as a woman of his own caste. The marriage of a Hindoo of caste with such woman seems from the above law to be forbidden, and it is not therefore valid.

Ans. 2.—If the *Maravar* caste and *Parivara* be similar in their manners the marriage of a Hindoo of *Maravar* caste with a female of the *Parivara* caste would be valid, as being in accordance with the Hindoo law. If they be dissimilar, and if the *Parivara* caste be inferior to the *Maravar* caste, such marriage would not be valid under the Hindoo law. If such marriage be, however, sanctioned by the custom of the said castes, then it would be good under such custom, *Vaidyanatha Dik Shiteyam*. *Menu*—"Let the twice born man espouse a wife of the same class with himself, and endued with marks of excellence." *Vyasa*—"A girl destitute of relations or caste, or born on the day of *Rohini*, that is, when the moon is in the fourth of the lunar mansions, or devoid of race, must be rejected."

The Pundits were further requested to state whether Hindoos of all castes are bound by the said law, and whether in particular it applies to a Hindoo of the Maravar caste, because the Pundits are stated in *Strange's Manual of Hindoo Law*, p. 10, to have declared that among the lower class of Soodras marriage with females who have lived in concubinage is allowed.

To which they replied, Our answer was intended to show that the law therein set forth applies to Hindoos of all classes who are within the pale of caste. The Hindoo law, therefore, binds all the

* Are not marriage and caste among Soodras regulated by custom in accordance with the law observed by the higher castes, and binding on them as a portion of the common law of India?

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Hindoos who conform to the Shasters, but not those of inferior caste who depart from them. The said law would likewise bind the *Maravar* castes only if it be governed by the *Shasters* in all its acts, but not otherwise. It is for this reason that we have stated in our former answers that the marriage referred to in the question would be good under the custom of the said caste. The answer in *Strange's Manual* applies to Soodras of inferior castes, who depart from the precepts of the Hindoo law.

Loss of caste.—When forfeiture of caste is incurred by either, intercourse between husband and wife ceases.

If by a sonless female.—Should the loss of caste be on the side of the female, and she be sonless, she is accounted dead, and funeral rites are performed for her.

If she have a son.—He is bound to maintain her, and by this means her existence is recognised, *Stra. Man.* § 32.

Prohibited degrees.—But though the caste may be the same, the prohibited degrees of relationship are not to be infringed. Amongst the higher castes, a woman must not be descended from the paternal or maternal ancestors of her proposed husband within the sixth degree, *Menu*, ch. iii. § 4, 5. But these rules, like those of caste, have greatly relaxed, and in all castes only uncles, brothers, and sisters, and their descendants are prohibited as being too nearly allied, 1 *Stra. H. L.* p. 40; *Stra. Man.* § 45.

Marriage of younger brother or sister before an elder.—It is said that the marriage of a younger brother or sister before an elder is discountenanced, 1 *Stra. H. L.* p. 41.

Adopted son.—An adopted son is considered as a natural child in all matters regarding marriage and degrees of affinity, but though he loses the rights of property out of the family to which by birth he belongs, yet in respect of marriage and affinity he is still a member of that family, so that he is under a double disadvantage as regards marriage. He can neither marry within the prohibited degrees into the family who has adopted him, nor can he marry within the same degrees into the family from which he has come. See "Adoption."

Causes of separation.—There are other causes of separation besides infidelity, not absolute indeed, or a severance of the marriage tie, but entitling the wife to maintenance. These are mainly caused by disappointment of the object of marriage, and arise from impotence in the man, confirmed barrenness in the woman, loathsome incurable disease in either, and the like, *Stra. Man. H. L.* § 35.

Supersession,* or polygamy.—Supersession is that right by which a man claims to have a plurality of wives. According to

* The word supersession has been retained in deference to the earlier writers on Hindoo Law. It is not accurate to say that because a man takes a second wife he supersedes the first. Both live together if possible in harmony —Polgamy is more correct.

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Hindoo law and usage, it seems clearly, whatever may be thought of the morality of the step, that amongst Hindoos polygamy is permitted, and that it is competent to the Hindoos to have several wives. How many, *Sir Thomas Strange* observes in his *Hindoo Law*, vol i. p. 56, it is competent to him to have at one and the same time does not distinctly appear.* The prohibition which is found to be directed against a plurality of wives, save under certain justifying circumstances, such as the first wife's infidelity, bad temper, barrenness, or production only of daughters, appears to be treated alike, as many other rules of Hindoo law, as merely directory and not imperative, per *Scotland, C. J.; Verasvami Chetie* v. *Appasvami*, 1 *Mad. H. C. R.* 378. It is a practice, however, which is objected to by a majority of Hindoos in Bengal, who have petitioned the Governor-General of India in council to suppress it by enactment.

But the husband cannot supersede his wife at his mere pleasure. In some instances it is justifiable, in others it is only admissible, and where it can neither be justified nor tolerated, it is illegal, 1 *Stra. H. L.* 52. We shall consider these in their order.

Justifying circumstances.—Such circumstances may be classified under two heads—viz., 1st, Consent; 2d, Legal causes.

1st, Consent.—The consent of the wife without any disqualifying causes on her part of itself warrants re-marriage, *Stra. Man.* § 35. Many devices are resorted to for the purpose of obtaining her consent and reconciling her to her altered position, such as a suitable settlement, a compensation, amounting, with her *stridhana*, or woman's property, to a value equivalent to the expenses of the second marriage, 1 *Stra. H. L.* 53. But the measure of gratuity for supersession seems not to be settled, *ib.* 30, 54. In estimating it, however, account is to be taken of what she already possesses, and the difference only is to be given her, and if the difference is the other way, then a trifle only for form's sake, 1 *Stra. H. L.* 54.

2d, Legal causes.—When the first wife is addicted to habits of intoxication, has been long diseased, bears daughters for ten years, exhibits want of chastity, is habitually disobedient or disrespectful towards her lord, is bad tempered, barren, expensive, mischievous, abusive, 1 *Stra. H. L.* 53; *Stra Man.* § 12.

It has, however, been said that cheerful acquiescence on her part entitles her to proportionable liberality, while contumacious resistance subjects her to coercion, public exposure, and correction, 1 *Stra. H. L.* 53.

Present on second marriage.—We have seen that when the wife has consented to the second marriage, the husband is bound to make her a suitable present equal, with her *stridhana*, to the expenses of the second marriage. We may observe, that for this

* In one case the husband had seven wives.

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the wife may sue the husband, although her misconduct would be an answer to the action, *Stra. Man.* § 36.

ILLEGAL SUPERSESSION is the abandonment for another, a blameless and efficient wife who has given neither cause nor assent, for which the husband may be brought to his senses by the king, by severe chastisement.

The second marriage will not be invalidated by reason of the absence of these justifying causes, *Stra. Man.* § 12.

The respondent betrothed his daughter to the appellant, who having afterwards contracted a second marriage, (by the Nutra rite,) the respondent sought to compel the appellant either to consent to a divorce, or to dissolve the second marriage, and admit his daughter to her rights. It was urged, in defence, that the appellant was full grown, and the respondent's daughter not arrived at years of puberty, and under these circumstances a second marriage was permitted by the rules of their caste, (*Lewa Koonbi*,) it was held that the appellant's conduct was justified by the rules of the caste, and by the laws of the Shaster, and the divorce, or annulment was refused, 1 *Morl. Dig.* 289, § 13.

A wife is entitled to a divorce for ill treatment according to the rules of the Kunsara caste, *ib.* § 14.

A divorce will be granted on account of a husband's dissolute life and bad character if the caste permits it, though the *Shaster* does not admit of divorce under any circumstances, *ib.* 14 *a.* A man of the Gandharva caste married a second wife, the court held that unless there was good cause, natra was not permitted amongst them, the court granted a divorce to the first wife as they both did not agree, *ib.* § 15.

RESIDENCE OF FIRST WIFE.—A wife who has been thus superseded, whether justifiably or not, must be provided for. She should continue to reside with her husband, or if he oblige her to leave him, with his relatives; or failing them, her own, and he is bound to maintain her. See *post.*

ENTITLED TO INHERIT.—Abandoning an innocent wife under circumstances other than those named is immoral and punishable. In such a case the first wife is in nowise to suffer in position. She will, for instance, inherit just as if no second wife had been taken, and her debts would be binding on her husband. See *post.*

RESIDENCE OF SEVERAL WIVES.—Where there were several wives, according to the old rule of different castes, they ranked according to their castes. But precedence is now given according to seniority of marriage, as all must be of the same caste. The one first married is therefore the one who is to be still honoured, not having been superseded for any fault, and she it is, the elder, not necessarily in years, but according to priority of nuptials, who succeeds eventually to her husband as heir, maintaining the others, who inherit in their turn on her death, or even during life, in the event of her degradation, possessing as they do a capacity for the

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performance of religious ceremonies being the consideration upon which the widow as well as the son is preferred in inheritance, 1 *Stra. H. L.* 56, 137, see *post.* Mr Justice Strange, § 326, observes, that it has been held where there may be a plurality of wives the one first married succeeds to the exclusion of the others, *judgment of Sudr. Court in R. A.* 5 of 1824, and i. of 1835. This, he remarks, is not the law in Southern India, where the wives are viewed as on an equality, and inherit jointly. Mr Strange refers to *Smiriti Chand.* p. 178, § 57, by which he is supported.

PERSONAL CHASTISEMENT OF WIFE.—According to Menu the husband occupied the place of a father to his wife, and was permitted therefore to exact absolute obedience by personal chastisement. But such a law would receive no sanction in a British court.

WITHDRAWAL OF CONJUGAL RIGHTS.—The denial or withdrawal of conjugal rights by either party is denounced with heavy penalties, and the relative duty of maintaining each other is enjoined, 1 *Stra. H. L.* 48.

DIVORCE ACCORDING TO HINDOO LAW.—This right would seem to be confined to the husband. Amongst some of the lowest castes divorce is obtainable by each, and the woman may marry again. Such marriage is called *Natra*, and is familar in Bombay, 1 *Stra. H. L.* 52.

RE-MARRIAGE.—The doctrine that a Hindoo widow cannot remarry, has been abolished by Act xv. of 1856. Section 1 provides that no marriage contracted with Hindoos shall be invalid, and the issue of no such marriage shall be illegitimate by reason of the woman having been previously married, or betrothed to another person, who was dead at the time of such marriage, any custom and any interpretation of Hindoo law to the contrary notwithstanding. Section 2 annuls upon a marriage all rights and interests which any widow may have in her deceased husband's property by way of maintenance, by way of inheritance to her husband, or to his lineal successors, or by way of any will or testamentary disposition conferring upon her without express permission to re-marry, only a limited interest in such property with no power of alienating the same. Section 4 provides that, nothing in this Act shall be construed to render any widow who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property; if before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow. Except as in the preceding sections is provided, a widow shall not by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled, and any widow who has remarried shall have the same right of inheritance as she would have had, had such marriage been her first marriage, sec. 5.

Suttee or wife burning or burying alive is abolished, *Reg.* 1 of 1830, § 4, cl. 2, and § 5.

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All persons convicted of aiding and abetting in the sacrifice of a Hindoo widow by burning or burying her alive, whether the sacrifice be voluntary or not, shall be guilty of culpable homicide, and shall be liable to be punished by fine, imprisonment, or both, nor shall it be held to be any plea of justification that he or she was desired by the person sacrificed to assist in putting her to death, *ib.*

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CHAPTER II.

ON ADOPTION.

SECTIONS.

I. GENERAL OBSERVATIONS.
II. WHO MAY ADOPT.
III. WHO CANNOT ADOPT.
IV. WHO MAY GIVE.
V. WHO MAY BE ADOPTED.
VI. EFFECT OF ADOPTION.
VII. MODE AND FORMS OF MAKING ADOPTION.

SECTION I.—*General Observations.*

Hindoo law of adoption based on spiritual necessities—Marriage directed to sonship—Adoption put in force on failure of male issue—Etymology of Puttra—Some difference in the several schools—Mahommedan law of adoption same as the English—By Hindoo law adopted sons become as natural born sons—Exception to rule—Failing son, widow may perform obsequies—Presumption in favour of adoption—Evidence of adoption—Natural born sons—Failure of—It is not the performance of obsequial rites that saves from Put—Civil tribunals regard only civil rights.

HINDOO LAW OF ADOPTION BASED ON SPIRITUAL NECESSITIES.—The Hindoo law of adoption, like that of inheritance, is based upon the spiritual necessities of a Hindoo.

MARRIAGE DIRECTED TO SONSHIP.—Sonship is indispensable to him. His marriage is mainly directed to that object, with a view to the procreation of a fitting person to perform exequial rites and discharge his ancestor's debts, or spiritual obligations; and so important are these held to be by Hindoos, that if marriage should fail in its object, they must have recourse to the expedient of adoption, by which a substitute for a natural born son is obtained. Adoption, then, is of daily practice, and is of especial import as connected with inheritance.

ADOPTION PUT IN FORCE ON FAILURE OF MALE ISSUE. — This right is put in force on failure of male issue; the future happiness of the Hindoo depending, according to his superstition, upon the performance of obsequies and the payment of debts, temporal

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and spiritual, by a son, as the means of redemption from an instant state of suffering after death. The dread is of a place called Put or Hell, a place of horror to which the *manes* of the childless are supposed to be doomed, there to be tormented with hunger and thirst, for want of those oblations of food and libations of water, at prescribed periods, which it is the pious, and indeed indispensable, duty of a son to offer, 1 *Stra. H. L.* 74. By this means he is supposed to save his parent from Put, and is consequently called *puttra*, or son, 1 *Stra. H. L.* 74.

Etymology of Puttra.—The etymology of *Puttra*, the Sanscrit word for "son," shows the necessity that compels every Hindoo to perpetuate his name. *Menu*, ch. ix. sec. 138, says, "Since the son (trayate) delivers his father from the hell named Put, he was therefore called *puttra* by Brahma himself." Again, "A son of any description should be anxiously adopted by one who has no male issue, for the funeral cake, water, and solemn rites, and for the celebrity of his name," *Smriti*, quoted in *Ratnakara*.

Marriage failing in its most important object, in order that obsequies should not remain unperformed, and eternal bliss be thereby forfeited, as well for ancestors as for the deceased dying without legitimate issue begotten, the law was provident to excess, enumerating eleven sons besides the legally begotten. Six derived their pretensions from birth, and six from adoption. *Menu*, ch. ix. § 159, 160, thus enumerates them, "The son begotten by a man himself in lawful wedlock; the son of his wife begotten in the manner before described; a son given to him; a son made or adopted; a son of concealed birth, or whose real father cannot be known; and a son rejected by his natural parents, are the six kinsmen and heirs. The son of a young woman unmarried; the son of a pregnant bride; a son bought; a son by a twice married woman; a son self-given; and a son by a Soodra, are the six kinsmen, but not heirs to collaterals." The first, viz., the issue male of the body lawfully begotten being the principal one of the whole, as the son *given* in adoption was always the preferable one amongst those obtainable expressly in this mode, *Yajnawalcya*, 3 *Dig.* 241. And now these two, or at the most, three, the son by birth, *aurasa*, and the son by adoption, *dattaka*, or the son *given*, and the *kritrima*, or son made, are, generally speaking, the only subsisting adoptions allowed to be capable of answering the purpose of sons, *Smriti Chand. Saunaca, and Vrihaspati*, 2 *Stra.* 82 *Coleb.; Datt. Chand.* sec. 1, par. 9; though in some of the northern provinces forms of adoption other than that of the Dattaka still prevail, 3 *Dig.* 276, 289; 1 *Stra. H. L.* 75. The *Kritrima* form of adoption prevails in the province of Mithila. In strictness, perhaps, this form should be held to be abrogated, see *Sir W. Jones's Translation of Menu*, note; 3 *Dig.* p. 272. But immemorial usage legalises any practice, *Vrihaspati*, cited 2 *Dig.* p. 128. See *post*, pp. 49, 59.

Some difference in the several schools on adoption.—On

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the subject of adoption there is some difference in the several schools. The *Dattaka Chandrika* and *Dattaka Mimansa* are the two chief authorities, and equally respected by all the schools, 1 *W. H. Macn. Prins. H. L.* 66. Nearly all schools follow the Dattaka Chandrika in preference to the Dattaka Mimansa, where these celebrated treatises differ, 2 *Mad. H. C. R.* 214.

The customs of the Greeks, with reference to adoption, are applicable, for the most part, to the system which prevails amongst the Hindoos. Dr Potter, the author of the *Antiquities*, vol. ii. p. 342, in treating of the customs of Greece, says, "Adopted children were called παιδεσθεται or σεισποιητοι,* and were invested with all the privileges and rights of, and obliged to perform all the duties belonging to such as were begotten by their fathers. And being thus provided for in another family, they cease to have any claim of inheritance or kindred in the family which they had left, unless they first renounced their adoption,† which the laws of Solon allowed them not to do, except they had first begotten children to bear the name of the person who adopted them, thus providing against the ruin of families which would have been extinguished by the ruin of those who were adopted to preserve them. If the adopted persons died without children, the inheritance could not be alienated from the family into which they were adopted, but returned to the relations of the person who adopted them. The Athenians are by some thought to have forbidden any man to marry, after he had adopted a son, without leave from the magistrate; and there is an instance in *Tzetzes's Chiliads* of one Leogoras, who, being ill-used by Andocides, the orator, who was his adopted son, desired leave to marry. However, it is certain that some men married after they had adopted sons; and if they begot legitimate children, their estates were equally shared between those begotten and adopted," *Macn. Prins. H. L.*, "Adoption."

Mr Sandars' "Inst. of Justinian," p. 113, third edition, with reference to the customs of the Romans regarding adoption, says, "Before the time of Justinian the effect of adoption was to place the person adopted exactly in the position he would have held had he been a son of the person adopting him. All the property of the adopted son belonged to his adoptive father. The adopted son was heir to his adoptive father, if intestate, bore his name, retaining, however, the name of his own *gens*, with the change of *us* into *anus*, as Octavius into Octavianus, and shared the sacred rites of the family he entered."

A public character was always attached in ancient Roman law to so important an alteration in families as adoption. The sanction of the *curiæ* was probably necessary to its validity when the family of a member of the *curiæ* was affected. "If the person

* Paidesthetai, seispoietoi.

† In this respect the Greek adoption differed from the Hindoo, (see *post*, p. 58, *Cancellation.*)

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adopted was *sui juris*, his entry into a new family (*arrogatio*) was jealously watched, as the *pontifices* would never allow it where there was any likelihood of the sacred rites of the family he quitted becoming extinct by his departure from it. The form of gaining the consent of the *curiæ* was even continued when the *curiæ* were only represented by thirty *lictors*, until the rescript of the emperor was substituted as a means of effecting arrogations. . . . . We may guess arrogation was effected by a fictitious suit, in which the person arrogated was claimed as the child of the arrogator, and let judgment go by default."

If the person adopted were under the power of another, the person under whose power he was had to release him from that power, which he did by selling him (*mancipatio*) three times, which destroyed his own *patria potestas*, and then giving him up to the adopting parent by a fictitious process of law called *in jure cessio*, in which he was claimed and acknowledged as the child of the person who adopted him, and pronounced to be so by the magistrate before whom the proceeding was held (*imperio magistratus.*) The word *adoptio* was common to both processes, both to *arrogation* . . . . and to *adoptio*, in its more limited sense of the adoption of a person not *sui juris*. In the ceremonies previously required for the adoption of a person *alieni juris*, Justinian substituted the simple proceeding of executing, in presence of a magistrate, a deed declaring the fact of the adoption; the parties to the adoption, *i.e.*, the person giving, the person given, and the person receiving, being personally present to give their consent. But it was sufficient if the consent of the party adopted were expressed by his not declaring his dissent—*non contradicente*.

The change made by Justinian in the law of adoption completely altered its character. It used sometimes to happen under the old law that a son lost the succession to his own father by being adopted, and to his adoptive father by a subsequent emancipation. Justinian wished to remedy this effectually. He therefore provided that the son given in adoption to a stranger, that is, to any one not an ascendant, should be in the same position to his own father as before, but gain by adoption the succession to his adoptive father, if the adoptive father died intestate. The adoptive father was not, however, bound like the natural father to leave him a share of his property if he made a will. In this kind of adoption, termed *adoptio minus plena*, the adoptive son still remained in the family of his natural father, and the only change which adoption caused was, that he acquired a right of succession to his adoptive father if intestate.

When the person to whom the adopted son was given, was one of his own ascendants, then the old law regulated the effects of the adoption, and the adoption in this case was what commentators term *adoptio plena*. The adopted son entered the family of

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the ascendant, who became his adoptive father. A grandson was not naturally in the same family with his maternal grandfather, and could only enter the family of his maternal grandfather by being adopted. If he had been born after his father had been emancipated, he would not be in the same family with his paternal grandfather, who might therefore wish to adopt him. It was even possible that he might be adopted by his own father; for if born before his father was emancipated, his grandfather might have emancipated his father without emancipating him, and then might afterwards have given him in adoption to his father.

Neither women nor children under the age of puberty could be arrogated. Arrogation was first permitted in the case of the latter by Antoninus Pius, but only after strict inquiry had been made into the circumstances of the case. Besides the general inquiry which took place in any case of adoption, further regulations were made, designed to protect the property of the *impubes*. Any one who wishes either to adopt or arrogate should be the elder by the term of complete puberty, *i.e.*, eighteen years.

So long as the required number of years intervened, there was no further positive rule as to age; but it being in the discretion of the emperor to allow adoption or not, there was generally a disposition to refuse it, unless the person who wished to adopt was of such an age as to make it impossible he should have children of his own.

As adoption follows nature, it would have seemed without express enactment that none but married persons could have adopted grandsons, and that a person to have had a grandson must have had a son.

With respect to the degrees of marriage, it sometimes made an important difference whether a person was appointed as a son or a grandson. The natural (*i.e.*, non-adopted) granddaughter, for instance, of the person adopting would be cousin or niece of the person adopted, according as he was adopted as a grandson or son, and might marry him in the one case and not in the other. A grandson could be adopted generally when he was supposed to be the issue of a deceased son, and so was *sui juris* at the death of the grandfather, or especially as the son of a particular son, in which case he came under that son's power when the grandfather died. The grandfather could at his pleasure diminish but could not add to the number of his son's family.

The adopted son is assimilated to the natural in *plurimis causis*, and not altogether, because if the adopted son left the adoptive family, he ceased to have any relationship whatever to its members, but the natural son was always cognatus to his own blood relations, although by emancipation or adoption he might cease to be agnatus to them.

Under Justinian's legislation the adoptive father, if a stranger,

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had no *patria potestas* at all, and therefore could not exercise such a power as that of giving his adoptive son in adoption to another person.

When once adoption was dissolved, all the relations created by it were at an end, except that marriage was forbidden between the person adopting and the person adopted. But the tie could never again be renewed between the same persons. Women also could not adopt, for they had not even their own children in their power. But by the indulgence of the emperor, and as a comfort for the loss of their own children, they were allowed to adopt.

If a person having children under his power should give himself in arrogation, not only did he submit himself to the power of the arrogator, but his children also, being in the arrogator's power, were considered his grandchildren.

All the property of the person arrogated became the property of the arrogator. The adopted son, as he was previously in the power of his natural father, had no property to pass.

MAHOMMEDAN LAW OF ADOPTION THE SAME AS WITH THE ENGLISH. —The act is a mere reception into one family of a child who by natural birth belongs to another, and it necessarily confers upon him no rights of inheritance, nor does it in any way fetter the adoptive father, so that property must be specially bequeathed or otherwise given to him, or else as an adopted son he inherits nothing, *Macn. Prins. H. L.* 86.

BY HINDOO LAW ADOPTED SON BECOMES AS A NATURAL BORN SON.— With regard to Hindoo law the position of an adopted son is very different. To all intents and purposes he becomes as the natural born son of the adoptive family, and loses all rights in his native family, since he is introduced for religious purposes and benefits, to rescue the father from Put or everlasting misery, 1 *Stra. H. L.* 97, 101, citing *Dattaka Mimansa of Nanda-Pandita*, ch. vi. § 8. If the adoption be invalid, his natural rights would remain unaffected, *Bawani Sankara Pandit* v. *Ambabay Ammal*, 1 *Mad. H. C. R.* 363, or unless in a *dwyamushyayana* adoption, see *post*, 46.

EXCEPTION TO RULE.—There is, however, one only exception to this rule, and this is the case of an after-born son. If the wife has been barren for many years, and a son has been adopted, and she should afterwards bear a son, the natural born son supersedes the adopted son, who, however, receives one-fourth of the share of the after-born son as a consideration for the injury done him by removal from his own family, *Ayyavu Muppanar* v. *Niladatchi Ammal*, 1 *Mad. H. C. R.* 45. In such a case as this, there was a reasonable ground for the adoption. Should the natural born son die without male issue, the adopted child will succeed to the whole of the property of his adoptive father, subject to charges elsewhere noticed. See *post*, " Charges on Property."

FAILING SON, WIDOW MAY PERFORM OBSEQUIES.—Failing a son, a Hindoo's obsequies may be performed by his widow, or, in

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default of her, by a whole brother or other heirs, but not with the same benefit as by a son, *Datt. Miman.* sec. 1, § 58, 59; *Vrihas pati.* 3 *Dig.* 458; *Vriddha Menu,* 3 *Dig.* 478; 1 *Stra. H. L.* 76. That a son, therefore, of some description, is with him, in a spiritual sense, next to indispensable, is abundantly certain. But exacted as it is whenever the want exists in terms sufficiently peremptory, it is a right, and not a duty to be enforced by the civil power, *ib.* 76. No good Hindoo lawyer, sitting in our courts in India, would listen for a moment to an application to compel a childless Hindoo to adopt, succession to his property being in all events provided for, whether he have a son to inherit it or not, 1 *Stra. H. L.* 76. It is on this ground that wills are said to be unknown to Hindoo law, see *post,* "Alienation by Will."

Presumption in favour of adoption.—The presumption in favour of adoption is strong, for the spiritual welfare of the husband depends upon his being represented by a son, *Huradhun Mookurjia* v. *Muthoranath Mookurjia,* 4 *Moore's In. Ap.* 414; and this necessity is strongly shown by writers of the highest authority in India, 1 *Stra. H. L.* pp. 7, 73, 76, 2d ed.; 1 *Macn. Prins. H. L.* p. 63; *Inst. of Menu,* ch. 9, § 107; *Jim. Vahana,* ch. xi., sec. 1, § 31; *F. Macn. Cons. of H. L.* 176; 3 *Coleb. Dig. of H. L.* 274, 5. *Crastnarao Wassudenji* v. *Rayuneth Harichandarji Perry's Oriental Cases,* 150. Adoption, however, must be strictly proved.

Evidence of adoption.—Where there is conflicting evidence upon the fact of an adoption, much will depend upon the probabilities of the case to be collected from facts as to which both parties are agreed: as, in the case of a childless Hindoo advanced in years, where it was in the highest degree improbable that he could have any children by his wives, and he adopted a boy in despair of having issue, who died in his adoptive father's lifetime, the fact of his religious tenets, by which his salvation depended upon his leaving a son to perform his funeral oblation, was held to be strong probability in favour of such adoption.

The evidence of witnesses to the fact of a parol adoption, without deed, was contradictory. The provincial law courts in India held that a claimant to the succession as adopted son had not established, by credible testimony, the fact of such adoption. Upon appeal, such decrees were reversed, the court holding that the presumption in the circumstances was in favour of adoption, and that the evidence was sufficient to establish the claimant's title, *Huradhun Mookurjia* v. *Muthoranath Moorkurjia,* 4 *Moore's, In. Ap.* 414; *Rungama* v. *Atchama, ib.* 1, 104.

Natural born sons.—Of course, if there are natural born sons, or sons born in wedlock, no difficulties as to heirship can possibly present themselves in performance of exequial rites.

Failure of.—But should male issue fail, or, from other circumstances hereafter mentioned, male issue existing, they should

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be incompetent to the performance of funeral rites, then very important questions arise as to the rights of adoption amongst Hindoos.

It is not the son's performance of obsequial rites that saves from Put.—*Mr Strange*, in his *Man. of H. L.* § 51, maintains that the mere birth of a son, who may die immediately after, saves from Put, but adds he may nevertheless adopt a son to perform his funeral rites, and keep up his line.

In *Chinna Gaundan* v. *Kumara Gaundan*, 1 *Mad. H. C. R.* 57, *Sir Colley Scotland, C.J.*, says, Mr Strange's argument rests on the assumption that it is the birth, or adoption of the son that delivers the natural, or adoptive father from Put. Surely this is erroneous. It is the son's performance of the father's exequial rites, not his birth or adoption, that relieves the father from Put. Adoption takes place, according to *Atri*, (*Dattaka Chandrika*, i. 3,) for the sake of the funeral cake, water, and solemn rites. According to *Manu*, (*ibid.* and *Dattaka Miman.* i. 9,) for these objects, and also for the celebrity of the adoptive father's name, but not for the sake of the supposed efficacy of the mere act of adoption. If, then, the saving virtue lies solely in the performance of exequial rites, Mr Justice Strange's doctrine of the total expenditure on the natural father of the efficacy of the son's birth does not seem to warrant his conclusion. The adoptive son may well perform his adoptive father's rites, and in certain cases it appears, when he is dwyamuchyayana, (*i.e.*, the son of two fathers,) those of his natural father also. See observations on this case, *post*, p. 45.

Civil tribunals regard only civil rights.—Civil tribunals, however, regard only civil rights in this matter, and not the relative benefits to the soul, per *Scotland*, *C. J.*, 1 *Mad. H. C. R.* 56. But we are of opinion that the religious element cannot be excluded, see *post*, p. 44.

The father may adopt whom he will.—We shall consider the subject under the following heads :—

1. Who may adopt.
2. Who cannot adopt.
3. Who may give.
4. Who may be adopted.
5. The effect of adoption.
6. The mode and form of making adoption.

Section II.

Who may Adopt.

Sonless man—Consent of wife—Whether father, having given away an only son, can adopt another—Who included in legitimate male

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issue—Daughter's grandson—Two cannot adopt the same son—Uncle cannot adopt a nephew already adopted—Adoption must be valid when made—Where male issue incompetent to the performance of funeral rites—When father converted to Christianity—Successive adoptions—Second adoption during the life of the first adopted son—Acquiescence in division of property by the father—Undivided brothers.

Sonless man.—Any Hindoo may adopt, who is destitute of male issue competent to the performance of his funeral rites, or, as it is expressed, for the sake of the funeral cake, water, and solemn rites, and celebrity of his name, and redemption from debt to his progenitors, *Datt. Miman.* citing *Atri,* sec. i. § 3, § 5; *Datt. Chand.* sec. i. § 3; 4 *Moore's, In. Ap.* 45. A man is destitute of male issue, to whom no son has been born, or whose son has died, *Datt. Miman.* sec. i. § 4; *Datt. Chand.* sec. i. § 4. None can adopt, therefore, who have male issue competent to the performance of funeral rites *infra.* At the moment of birth a man becomes father of male issue, and is absolved from debt to his progenitors, *Datt. Chand.* sec. i. § 5.

Consent of wife.—The consent of a wife to the adoption of a son by her husband (a childless Hindoo) is not essential to the validity of the adoption. Adoption is an act of the husband alone, although the wife may join in it, *Rungama* v. *Atchama,* and *Atchama* v. *Ramanadha Baboo,* 4 *Moore's In. Ap.* 1, and although it may enure for the benefit of both.

Whether a father, having given away an only son, may adopt another.—The benefit of the son may form a consideration with a father for giving him in adoption. Thus, he may be himself without the means of providing for his son, and may consequently, for the lad's interests, be induced to give him in adoption to one who is sonless, but possessed of property. Being thus deprived of the most fitting person to perform his exequial rites, there seems to be no objection to his adopting a son for that purpose.

Who included in legitimate issue, son, grandson, and great-grandson.—"Male issue," in Hindoo law, comprises three generations—viz., the son, the grandson, and the great-grandson; *i.e.*, the son's grandson, *Menu,* chap. ix. § 137; *Datt. Miman,* sec. 1, § 13, 44; *Datt. Chand.* sec. i. § 6; 3 *Dig.* 295. All stand in the relation of sons for the purposes of inheritance and religious ceremonies. Where there is, therefore, a son's son or. grandson, adoption is not necessary, and not only is it not necessary, but the son being dead, adoption would operate prejudicially to their rights of inheritance, *Datt. Miman,* sec. i. § 13, 14.

It therefore results, that one only destitute of a grandson or great-grandson may adopt, *Datt. Chand.*, sec. i. § 6, citing *Saunaka.*

Grandson by daughter.—It has been doubted, says *Macn.*

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in his *Principles of H. L.* p. 66, note, by the author of the *Considerations*, p. 150, whether a grandson by a daughter is within the above rule; but there is no solid foundation on which such a doubt can rest. It must have arisen from the indiscriminate use of the word ("grandson") in the English translations, as applicable to the daughter's son, as well as to the son's son. *Mr Sutherland*, in his *Synopsis*, p. 212 (*Stoke's H. L. B.* 664), infers, and justly, that if male issue exist who are disqualified by any legal impediment (such as loss of caste) from the performance of exequial rites, the affiliation may legally take place. In the *Summary of Hindoo Law*, p. 48, it is laid down as a rule that the insanity of a begotten son would not justify adoption by a parent; but to this and other general positions laid down in that work, I cannot altogether accede. For instance, it is stated that the *Pûna Shastris* do not recognise the necessity that adoption should precede marriage; that a younger brother may be adopted by an elder one; that the youngest son of a family cannot be adopted, &c., &c.; for none of which can I find authority, though undoubtedly the whole of these positions may be just when applied to that side of India, as founded on the *lex loci*, or immemorial custom.

TWO INDIVIDUALS CANNOT ADOPT THE SAME SON.—The same person must not be adopted by two individuals, *Datt. Chand.* sec. i. § 7, except in the case of one nephew by several uncles, the whole brothers of his natural father, *Suther. Synop.*

UNCLE CANNOT ADOPT A NEPHEW ALREADY GIVEN IN ADOPTION TO ANOTHER.—It may be inferred that a legal impediment would exist to the affiliation by an uncle of a nephew, whom his father had given away in adoption as a *Sudha Dattaka*, who retains no filial relation to his natural father, *Suther. Synop.* Head 2d.

THE ADOPTION MUST BE VALID WHEN MADE.—The adoption must be valid when made, for its inherent defects cannot be cured.

WHERE MALE ISSUE INCOMPETENT TO THE PERFORMANCE OF FUNERAL RITES.—If a man have male issue, who, however, from any reason, such as degradation from caste, insanity, disease, &c., are incompetent to the performance of funeral rites, to all intents and religious purposes he is without issue, and may therefore adopt, 1 *Stra. H. L.* 77, 98. See *Shamchunder* v. *Narayni Dibeh Bengl, R.* 1807, p. 135, *Morl. Dig.* p. 14, § 13, *Suth. Synop.* 212.

WHERE FATHER CONVERTED TO CHRISTIANITY.—Interesting questions here arise as to the effect of Act xxi. of 1850—"The Emancipation Act" permitting a converted Christian, though degraded from caste, to inherit. Can the father adopt? and what would be the right of the adopted son? The Act reserves to him his rights. One of these rights is the power of adoption, and of conferring on a male child, not procreated by himself, rights to the detriment of others who would stand in the position of heirs had he not made an affiliation. The question might arise, whether the courts would allow a Hindoo after con-

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version to Christianity to exercise a right so intimately connected with the Hindoo religion as that of adoption? Probably the Act itself might be considered to present no obstacle; but it appears to us that no valid adoption could possibly be made by a Christian so as to render it effectual with reference to Hindoo law. He could not perform the ceremonies of adoption.

Another question may arise. On the conversion of the son, a Hindoo father might lose the only person capable of performing his funeral rites. The convert's interests are protected by the Act. Is the father at liberty to deprive him of a portion of the inheritance by adopting a son? The Hindoo law does not provide for the case of a man adopting during the existence of a son, nor for the share a son adopted under such circumstances would be entitled to. Previous to the Act no difficulty could arise, inasmuch as on conversion the son became an outcast, and as such dead in the eye of the Hindoo law; the unconverted father was therefore at liberty to provide for the performance of his funeral ceremonies by adoption. We think the present difficulty might be overcome by the father's dividing with the convert, and then adopting; in which case the adopted son would seem to be entitled to succeed to the father's share.

SUCCESSIVE ADOPTIONS.—Whatever reasons require the adoption of one, also allow succeeding adoptions to be made when the purposes of the first fail, as when the first dies without issue or adoption. But only one adopted son can be taken at a time, and he succeeds to all the property of his adoptive father. See *Shamchunder v. Narayni Dibeh; 1 Morl. Dig.*, p. 14, § 13, 20, and note; 3 *Dig.* 295; *Datt. Miman*, sec. i. § 6; 2 *Stra. H. L.* 85; *Steele*, 52, 185; 2 *Macn*, *Pris. H. L.* 200; *Macn. Cons. H. L.* 146, 157.

SECOND ADOPTION DURING THE LIFE OF THE FIRST ADOPTED SON. ACQUIESCENCE IN DIVISION OF PROPERTY BY THE FATHER.—V., a Zamindar in the northern circars of Madras, of the Soodra caste, being childless, adopted with the consent of his wife a son, Jaganadha; at the same time he executed a deed with the natural father of the adopted son, binding himself to make him heir of his zemindary and wealth. V. subsequently married a second wife, and afterwards, and during the life of his adopted son, he adopted a second son, Ramanadha. They both lived in the house of V., who, while they were minors, made a division of his ancestral, and other estates between them in certain proportions. Jaganadha when he came of age entered into possession of his share, but Ramanadha being a minor, V. managed his share for him, and died during his minority. At V.'s death Jaganadha claimed the right of succession to the whole of V.'s estate and property, on the ground that V. was precluded from alienating any portion of the estate to his, Jaganadha's prejudice, and that Ramanadha's adoption during the life of the former was illegal and void. The Sudder Adawlut at Madras decided that the second adoption was

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valid. Held upon appeal by the judicial committee of the Privy Council reversing that decree :—1st, That according to the Hindoo law a second adoption of a son, the first adopted son being alive, and retaining the character of a son, was illegal and void.

2d, That Jaganadha's acquiescence in the division after he came of age did not preclude his right to recover the ancestral estate, as V. had no power to alienate any portion of the ancestral estate to Jaganadha's prejudice.

3d, That upon the principle that a party cannot affirm and disaffirm the same transaction, effect must be given to the intentions of V., so far as he had power to dispose of his property by an act *inter vivos*, and in which Jaganadha had acquiesced, and that as he took the whole of the ancestral property of V., he must give up for the benefit of Ramanadha that part of V.'s other property which was included in his share in the division, and to give effect to which his consent was not necessary, *Rungama* v. *Atchama*, and *Atchama* v. *Ramanadha*, 4 *Moore's In. Ap.* 1.

There were two appeals in this case against a decree of the S. A. of Madras, made in three separate suits in the Provincial Court, to determine the right of succession to the estates of V. The first suit was instituted by Ramanadha against Jaganadha, the adopted son of the late V.—1st, as adopted son of V.; 2d, Under a settlement made by V. dividing the estates between J. and R., the former having taken possession of the whole on V.'s death. The second suit was instituted by Atchama, the appellant in the second appeal against R., claiming succession to V.'s estate as the senior widow of J., who died pending the suit between him and R., without issue by either of his wives, Atchama or Rungama; and 2dly, under a will alleged to have been made in her favour by J. The third suit was brought by the appellant Rungama, the junior widow of J., for herself and on behalf of Lutchmaputty as his guardian and adoptive mother, against Atchama, Ramanadha, and one Doss, claiming for Lutchmaputty, as the adopted son and testamentary heir of J., the whole of the estates of V. and J.

The first of the suits now in controversy began in 1820, being a suit brought by R. against J. to establish his right to that portion of the property which had been allotted to him in his character of adopted son by V. This suit was pending when J. died.

In 1824 a decision was pronounced against R., from which he appealed, and before the appeal was heard he died. He left no natural son, but two widows and a boy who had been brought up in his house, and who was said to be his adopted son. The question then arose who was entitled to succeed to the estate of Jaganadha. The question of what the estate of J. consisted, *i.e.*, whether he was entitled to the whole or only half of the estate of Vencatadry still remained unsettled; and with respect to the right of succession to J. it was not disputed that if he left a son, whether natural born or legally adopted, such son would be entitled to suc-

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ceed; that if he left no son but an undivided brother, such brother would be entitled to succeed; that if he left no son, nor undivided brother, the widow or one of the widows would be entitled to succeed.

On the death of J., Ramanadha set up a title to the whole estate of V., alleging (not very consistently with his former claim) that he and Jaganadha were undivided brothers, and that Jaganadha had left no issue natural or adopted.

Rungama at first acquiesced in the claim of Ramanadha, it being alleged by her that she was deceived by Ramanadha, who got authority to act for her, while it is alleged by others of the parties that she colluded with him.

Lutchmaputty was six years old, and no claim was preferred on his behalf.

Atchama instituted a suit, claiming the whole estate of Jaganadha, as his heiress; afterwards Ramanadha and Rungama quarrelled, and the claim of Lutchmaputty was advanced. The Sudder Court decided that Jaganadha and Ramanadha were undivided brothers, and that Lutchmaputty was not the adopted son of Jaganadha, and that Ramanadha was entitled to the whole inheritance of V., and against this decree the present appeals were brought. The litigants stood thus:—1st, Lutchmaputty, who claimed the whole inheritance which came from V., on the ground that Jaganadha was the only adopted son of V., and that he, Lutchmaputty, was the adopted son of Jaganadha. 2d, Atchama, who insisted that Lutchmaputty was not well adopted, and that she, as eldest widow, was entitled to succeed to the inheritance of Jaganadha. 3d, Rungama, who maintained the case of Lutchmaputty, but insisted that if he was not the adopted son, she was entitled to share with Atchama in the succession of Jaganadha. Lastly, Ramanadha, who maintained the decree as it stood.

As far as concerns Ramanadha, his whole title depended upon the validity of his adoption. If he was not well adopted, he was not a co-heir with Jaganadha, nor heir to Jaganadha. The first question therefore is as to the validity of the second adoption, the first adopted son still existing, and remaining in possession of his character of a son. This appears to have been long a point of great doubt in Hindoo law. The judicial committee in delivering judgment referred to three classes of authorities:—1st, The opinions of Pundits; 2d, The authorities as found in the Hindoo Treatises; and 3d, The European authorities.

With regard to the opinion of the Pundits, the preponderance is in favour of the second adoption. But these opinions are not conclusive. With regard to the Hindoo authorities, the court referred to the *Digest of Hindoo Law on Contracts and Successions*, with a commentary by *Jagannatha*, translated by *Coleb.* pp. 386, 395, 397; *Dattaka Miman*, sec. i. § 3, 6, 21; *Dattaka Chandrika*,

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sec. i. § 3, citing *Atri and Menu,* translation by *Sir W. Jones,* p. 313; *Vivadarnava Setu,* translated by *Halhed,* chap. 21, sec. ix.

With regard to European authorities, the court cited 1 *Stra. H. L.* p. 78. *Shamchumder* v. *Narayni Dibeh,* 1 *Beng. Sud. Dew. Ad. Rep.* 209, (1807.) *Gooreepershana Rai* v. *Mussumonaut Jymala,* 2 *Beng. Sud. Dew. Ad. Rep.* 136, (1814.) The first of these cases decided only that a second adoption is valid when the first adopted son has died without issue. In the second case the doubts seem to have been rather as to the effect of the second adoption by the husband himself in revoking the authority given to the wife than in the validity of the second adoption while a first adopted son is living. These cases have never been considered as settling the law upon the subject. In a note to the case of *Narainee Dibeh* v. *Hirkishor Rai,* 1 *Beng. Sud. Dew. Rep.* 42, supplied by Mr Coleb., he states the point as one of doubt, and one on which Jagannatha and Dattaka Chandrika were at issue.

Every European, without any exception, as far as we have any information, who has since examined the subject, has come to a conclusion adverse to the second adoption. In 2 *Stra. H. L.* p. 85, the law is thus stated by Mr Sutherland :—A Hindoo cannot have legally adopted children, a son, legitimate or adopted existing; any subsequent adoption would be invalid; at least the son so adopted would not inherit, *Sutherland's Synopsis of Hindoo Law of Adoption,* p. 212; *Steel's Synopsis of the Law of Hindoo Castes,* p. 48; *Sir W. Macn. Principles and Precedents of Hindoo Law,* vol. i. p. 80, without the slightest doubt or hesitation says :— "It is clear that a man having adopted a boy, and that boy being alive he cannot adopt another. The judicial committee held that the adoption of Ramanadha was invalid. This case has been acted on in *Sudanund Mohapattur* v. *Bonomallee,* 1 *Beng. H. C. R.* 317. Although no second adoption can be made during the life of the son first adopted; and although no adoption can be cancelled or annulled for any purpose whatsoever which would not justify a disinheritance; yet in case of death, disinheritance, or the like, another may be adopted, because in such case the very objects of adoption would be frustrated.

Undivided brothers.—Adoption is made quite regardless of the rights which may be injuriously affected by it as by one of two undivided brothers.

Section III.

Who cannot Adopt.

Unmarried men—Widower—Wife or widow—When to be adopted —Verbal authority—Widow under authority granted by minor

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ward without authority of Court of Wards—Dancing girls—Disqualifying circumstances—Minor—Lunatic—Out-caste—Convert to Christianity—Profligacy and disease.

Unmarried men.—*Sir Thomas Strange*, 1 *H. L.* 77, says, the necessity of the thing applies whether a man be single, married, or a widower, since to all equally his future state, according to his conception of it, is of the last importance. If with the Hindoos the competency of a single man to adopt do not appear to rest upon much authority, 3 *Dig.* 252, it is probably owing to the universality of early marriages between both sexes, which makes celibacy exceptional, *Sutherland's Synopsis*, note 4, p. 222; *Stokes, H. L. B.*, p. 671. 1 *Stra. H. L.* 78. *Mr Justice Stra. Manual*, p. 18, takes a different view. He says, an unmarried man cannot make an adoption; but for this he cites only a Pundit's opinion. Again he says, unmarried males, of whatever age, and females, whether married or unmarried, are not in danger of Put. No adoption on their account is hence necessary, neither would such adoption be valid; but for this no authority is cited. It has been held by the High Court of Madras, in *Nagappa Udapa* v. *Subba Sastry*, 2 *Mad. H. C. R.* 367, that an adoption by a widower is valid according to Hindoo law. The authorities referred to are *Strange's Manual*, § 61, relying on the authority of the *Dattaka Mimansa of Somanath*, which the court appears to consider of no authority, but why, does not clearly appear. *Sir Thomas Strange*, vol. i. p. 65 of the edition of 1825 (p. 77 of the third edition,) quoting a passage of *Jagannatha supra*, expresses his own opinion: "If with Hindoos the competency of a single man to adopt does not appear to rest upon much authority." In this the learned author is mistaken, inasmuch, as will presently be shown, *Jagannatha* says there is no authority on the point. *Sir W. H. Macn.* vol. i. *Prins. H. L.* p. 66, refers to Mr Sutherland's opinion, and an answer given by the Pundits, at vol. ii. p. 175, but refrains from expressing his own opinion. The Pundits say that an unmarried man may adopt, and refer to the *Dattaka Chandrika*, which does not support them, as well as to the *Dattaka Darpana*, which, like the *Dattaka Mimansa* of Mr J. Strange, we have no means of verifying.

Mr Sutherland, Synop. iv., has likewise been referred to. Certainly he inclined to the opinion that an unmarried man may adopt, and appears to have been chiefly influenced by what Jagannatha is supposed to have said in contradiction of what Medhatithi has expressed on the subject. Mr Sutherland labours under the impression that Jagannatha rigorously rejects as erroneous the doctrine which would restrict adoption to a man in the order of *Grihi*, or married man. In this respect Mr Sutherland has erred as well as Sir Thos. Strange. The passage referred to will be found in 3 *Dig.* 252, and is as follows:—" It should be here remarked that no law is found expressing that a son shall not be

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adopted by one who has not contracted a marriage." This passage does not justify the inference that the absence of prohibition sanctions such adoption. Upon this passage alone, the only authority that we have been able to discover, the decision of the High Court can be supported.

If we refer to the text books on adoption, we find that Atri, declaring the necessity for adoption, says—"By a man destitute of a son only must a substitute for the same always be adopted," *Dattaka Mimansa*, sec. i. § 3. By this we think it evident that the person who is destitute must be in a position to have procreated for himself a legitimate son, and consequently must have been married at the time.

Caunaka, citing *Dattaka Chandrika*, sec. i. § 4, says, one destitute of a son, or one whose son may have died, having fasted for male issue, may adopt. This clearly implies the existence of a wife. According to the translation, sec. 5, *ib.*, by *Mr Sutherland*, of *Menu*, chap. ix. § 106, which differs slightly from the translation by Sir W. Jones, it is declared : "By the eldest at the moment of birth a man becomes a father of male issue." It is the want of this male issue which, according to *Caunaka*, a man must fast for before he adopts. It would appear from *Dattaka Chandrika*, sec. i. § 24–27, that the wife likewise obtains spiritual benefit or exemption from exclusion from heaven by the affiliation of a son ; and it appears also from the case of *Rungama* v. *Atchama* and *Atchama* v. *Ramanadha*, 4 *Moore's In. Ap.* 1, that she may join in the adoption, 1 *Stra. H. L.* 78, 79. We, therefore, do not consider that the decision of the High Court is sufficiently conclusive to determine the question ; for if we look to the policy of the law, we may conclude that the necessity for a son was declared to encourage marriage, and it would open the door to fraud on the rights of kindred were the circumstances under which adoption may be made multiplied, on the ground that these circumstances are not expressly prohibited. *Mr Morley*, 1 *Dig.*, p. 16 § 35, cites a case where it was held that the right of bachelors to adopt rested on local customs, see *ib.* n. 2.

Wife or widow.—A wife or widow may adopt on behalf of her husband, but on the authority of the husband only, given during his life and for his benefit ; the child being adopted to him, and not to herself. The adoption having taken place, the adopted becomes son to both, and is capable of performing funeral rites to both, 1 *Stra. H. L.* 79. But in *Anandayi* alias *Kunjara Natchiar* v. *Rani Parvatavardani Natchiar*, 2 *Mad. H. C. R.* 206, (the Ramnad case,) it was held that a widow can adopt a son without the consent of her husband, according to Hindoo law ; and that where a widow adopted a son, with assent of the majority of the surviving kindred of her husband, the adoption was valid. But if the requirements of the consent of the sapindas is anything more than a moral precept, the assent of any one of them will suffice.

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This decision is at present in appeal before the Privy Council. It would be premature to discuss its propriety or otherwise question its authority; but, considering the reasons why the consent of sapindas is required to an act which would cut them off from the succession, it appears to us that since the law requires such consent, it is the consent of those who are likely to be prejudiced by the widow's adoption that is essential. The majority may consent in any given instance, but that majority may be composed of persons who have a very remote interest; and if their consent alone were considered sufficient, the interest of sapindas preceding them in degree might be prejudiced. Assent to adoption on the part of sapindas amounts to a renunciation of the succession, and should not, in our opinion, be lightly assumed, According to the *Vyavahara Koustabha* and *Mayukha*, chap. 4. sec. v. § 18, authorities of the highest repute amongst the *Mahrattas*, which, in this respect, follow the doctrine of the *Dattaka Chandrika*, the sanction of the husband is not requisite if the widow has obtained the permission of the caste and the sanction of the ruling powers. But under such circumstances she must adopt the next of kin to the deceased husband, his brother's son, if such exists,—*Sree Brijbhookunjee* v. *Sree Gokoolootsaojee Muharaj*. 1 *Borr.* 181; *Huebut Rao Mankur*, *Govinda Rao B. Mankur*, ii. *ib.* pp. 76; 1 *Morl. Dig.* p. 13, § 586-7; see also *Stra. H. L. Ap.* pp. 66, 68, 71; *Sir W. H. Macn.* 68, note.

In Madras the Pundits have expressed an opinion that the widow may adopt with the consent of the husband's relatives—see *Ranee Sevagamy Nachiar* v. *Streemathoo Huraniah Gurbah*, 1 *Mad. Sel. Dec.* 101, 104; and see *M. S. D.*, 1849, pp. 115, 117, and *S. A.* No. 156 of 1857; *M. S. D.* 1858, p. 5; *Stra. Man.* § 72; *Gibelin Études sur le droit civil des Hindous*, 79, 94; 1 *Stra. H. L.* 79; *Coleb. Mitacsh.* ch. 1, sec. xi. cl. 9.

In Bengal the husband's assent seems indispensable, *Macn. Prins. H. L.* 68; *Macn. Cons.* 195; 3 *Coleb. Dig.* 242; so likewise Benares, 2 *S. D. A.* 169, *Raja Haimun Chull Sing* v. *Koomer Gunsheam Sing*, 2 *Knapp, P. C.* 203, 221.

In Behar permission of the husband is necessary, and leave from the husband's kindred is not sufficient, *Jai Ram Dhami* v. *Musan Dhami*, 5 *S. D. A.* 3; 1 *Morl. Dig.* p. 13, § 8.

If the husband specify any one child, she can only adopt that one. See *Select Decrees of Madras Sudr. Court*; see 1 *Morl. Dig.* 16, § 33.

It is doubtful whether she may adopt a second in the event of the death of the first, 1 *Stra. M. H. L.* § 74; 1 *Morl. Dig. ib.*

If a particular child be named by the husband, and he dies before, or after the appointment, there would be reason for contending that her authority has been exhausted, and that she had not the power to adopt another; but if she can adopt without

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his consent, there seems no reason why she should not on the death of the first adopted son make a second adoption.

If a general authority be given she may adopt whom she pleases and whenever she pleases, although the boy be not in existence at her husband's death, 1 *Morl. Dig.* p. 15, § 25.

WHEN TO BE ADOPTED.—In the *Ramnad Zamindary* case, 4 *Moore's In. Ap.* 1, the adoption did not take place for a period of twenty years after the husband's death; but decorum and propriety require it to be done immediately after his death. See 1 *Morl. Dig.* 15, § 23. If no authority be given, *Sir Thomas Strange, H. L.* 79, says, that by the law of the Benares and Maharashtra Schools, the assent of the kinsmen after any lapse of time is sufficient and necessary.

VERBAL AUTHORITY.—The authority may be given in words in any form whatever, *Soondur Koorarra Dibbeea* v. *Guaadhur Pershad Tawarree, et è contra.* See 1 *Morl. Dig.* 15, § 26, 27; 2 *Stra. H. L.* 95.

WIDOW UNDER AUTHORITY GRANTED BY MINOR WARD, WITHOUT AUTHORITY OF COURT OF WARDS.—A Hindoo minor, and ward of court, authorised his widow, without obtaining the consent of the Court of Wards, to adopt a son, held that the adoption was invalid, *Mussumauth Anundmoyee Chowdhoorayan* v. *Sheeb Chunder Roy*, 9 *Moore's, In Ap.* 295. Kirtee Chundro Chowdhuree on his death left two sons, Juggut Chundro Chowdhuree and Bhoban Chowdhuree, both minors, his joint-heirs, in equal undivided moieties, according to Hindoo law, and the appellant, his widow, him surviving. The elder son died soon after his father, a minor, intestate, and unmarried. The other brother died in 1844, intestate, without issue, but leaving a widow, an infant of tender years, and his heir according to Hindoo law.

In 1846 the widow put forward Gerish Chundro as a son adopted by her under an unoomottee Putter, (a deed authorising her to adopt a son.) At the time this deed was executed by her husband he was a minor and ward of court, but there was no authority granted by the Court of Wards as required by *Beng. Reg.* x. of 1793, sec. 33, to enable him to adopt a son. The Sad. Dew. Ad. held that the law declares that no adoption by disqualifying landowners is to be deemed valid without the consent of the Court of Wards, on application made to them through the collector, sec. 33, *Beng. Reg.* x. of 1793. It follows necessarily that no power to adopt can be granted by such a person without the consent of the Court of Wards. The person who granted the power to adopt, on which the suit is founded, was at the time a ward of the court, and the consent of the Court of Wards was neither asked for nor obtained. It is therefore invalid, *ib.*

DANCING GIRLS.—Dancing girls are permitted to adopt females only, *Stra. M. H. L.* § 98, 99; 1 *Stra. H. L.* 80, *n.*; see *post* 47.

DISQUALIFYING CIRCUMSTANCES.—A doubt might be entertained

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as to the validity of adoption by a blind, impotent, or other person disqualified from inheriting. The more correct opinion, however, appears to be that such adoption would be good, though it seems reasonable that one excluded from the inheritance should confer no right of inheritance on the adopted, of which the adopter is debarred by law, *Sutherland's Synop.*, Head iv.

MINOR.—For the most part a minor being married may adopt. See *ante* p. 31; 9 *Moore's In. Ap.* 295, where the adoption by a minor was held invalid for want of permission of the Court of Wards.

A LUNATIC.—A lunatic cannot adopt, because an act of assent is necessary, there being a formal contract between the two fathers.

AN OUT-CASTE.—An out-caste cannot adopt—1. Because he is in so helpless a state as to the future that no adoption would benefit him; 2. Because he cannot inherit; 3. Because the principles of Hindoo law affect those only who are Hindoos. But now under the Emancipation Act, xxi. of 1850, these rules do not apply. That Act declares, that so much of the law and usages now in force within the territories, subject to the E. I. Co., as inflicts on any person forfeiture of rights or property, or may be held in any way to impair, or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the courts of the E. I. Co., and in the courts established by royal charter within the said territories, see *ante* p. 42.

SECTION IV.

WHO MAY GIVE.

The Father—Mother—Brother—Uncle.

THE FATHER.—Any one who has absolute authority over the child, *e.g.*, the father, may give him in adoption. "He whom his father or mother with her husband's assent gives to another as his son, provided that the donee have no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water," *Menu*, chap. 9, sec. iv. § 12; *Mitacsh.* ch. 1, sec. xi. § 9; *Maynukha*, chap. 4, sec. 5, § 1.

THE MOTHER.—The consent of the mother is not necessary, nor can she give her child in adoption without the consent of her husband, (*Datt. Miman.* sec. i. § 15, sec. iv. § 18; *Datt. Chand.* sec. i. § 31,) unless he be dead or otherwise incapable of giving his sanction; but in cases of urgent distress and necessity, the assent of the husband may be presumed; or, when he is *civiliter mortuus*, as by permanent emigration, entering a monastery, &c.,

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&c., the mother may make the gift, 1 *Stra. H.* 82; *Stra. Man.* § 78; *Sutherland,* 225, Head ix.; *Stokes, H. L. B.* 673; *Datt. Chand.* sec. i. § 31. *Sir W. H. Macn., Prins. of H. L.* 66, says, the only exception to the above rule of Menu that has been propounded by the commentators is contained in the *Dattaka Mimansa,* sec. 4, § 12, which refers to the gift of her son by a widow during a season of calamity.

According to *Madana* the disjunctive, "or," in *Menu's* text, means that if the mother be not present the father alone may give him away, and if the father be dead, the mother; but if both be alive, then both.

The brother.—Though *Mr Morley,* 1 *Dig.* p. 19, § 63, mentions a case where an elder brother was allowed to give a younger one in adoption after the death of the father, *Mr Strange, J. Man. of* 1862, § 97, denies this to be law, and with some reason, for the rights of both are co-ordinate; and further, it is necessary that the rights of the child should be protected against the attacks of a designing brother. See *Orphan, post,* p. 46.

When both parents are dead, the elder brother cannot give his brother in adoption. See *Orphan, post,* p. 46.

The uncle.—For the same reason an uncle cannot give a nephew away, *Stra. Man.* § 80.

Section V.

Who may be Adopted.

Must be the son of a woman whom the adopter might have married—Reflection of a son—Brother's son—Sister's son—Daughter's son—Exceptions to the rule—Only son—The result of authorities—Dwyamushyayana—Orphan—Illegitimate son—Whether an adopted son may be given in adoption—Same caste—Same gotra or family—Natural brother—A girl—Age bars adoption—Tonsure, removal of—Oopanayana—Whether illegal adoption curable—Marriage—Soodras.

He must be the son of a woman whom the adopter might have married.—The ruling canon here is, that no boy can be adopted with whose mother the adopter could not have married. The reason assigned being that the son must, by physical possibility, be as like the natural child as may be managed, *Datt. Miman.* sec. v. § 16; *D. Chand.* sec. ii. § 8; 1 *Stra. H. L.* 83; *Sutherland's Synop.* 2nd head. A male child alone can be adopted, not a female, *Mayukha,* chap. iv. sec. v. §. 6, except by dancing girls, *post,* p. 47.

Reflection of a son.—He must be "the reflection of a son," and that is interpreted to mean the son of a woman upon whom,

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if he were begotten by the adoptive father, he would not be the production of an incestuous intercourse. It is explained in *Datt. Miman.* sec. v. § 16, to be "the capacity to have sprung from the adopter himself through an appointment to raise issue on another's wife, as in the case of a son of a brother, a near or distant kinsman, and so forth."

Accordingly, the brother, paternal and maternal uncles, the daughter's son, and that of the sister, are excluded, for they bear not the resemblance to a son, *ib.* § 17; *Stra. Man.* § 85; 1 *Stra. H. L.* 83, for the adopter could not be the father of any of them without committing incest.

BROTHER'S SON.—It is true that a brother's son inherits, and performs obsequies to his uncle dying without preferable heirs; but then it is as his nephew, not as his son, *Datt. Miman.* sec. ii. § 67, and the spiritual efficacy in the one case and in the other is considered to be different. To render him a substitute for a son, he must have been filiated, 1 *Stra. H. L.* 86.

The spiritual efficacy does not appear to differ; for if we look at the texts upon the subject, we shall find that "if one among brothers of the whole blood be possessed of male issue, *Menu* pronounces that they all are fathers of the same by means of that son," *Datt. Miman.* sec. ii. § 65. Again the author, citing from the *Kalika-Purana*, represents the sage *Markandeya* to have said, "Those who are fathers of male issue by means of their sons and those of brothers attain heaven," *ib.* sec. ii. § 45. Hence it would appear that a childless brother is delivered from Put on the birth of a brother's son. Nevertheless, he may adopt, but if he does not, the funeral oblations offered to his *manes* by his nephew would, according to the texts just cited, appear to us to be as efficacious as if they had been effected by an adopted son.

It has been supposed that a brother's son is the proper person to prefer for adoption. But the selection of a stranger would not invalidate the rite, *Dattaka Chandrika*, sec. 1, § 22. But see *Dattaka Mimansa,* contra. It would appear, however, that according to the law of Bengal and elsewhere, where the doctrine of the *Dattaka Chandrika* is chiefly followed, that where the doctrine *factum valet* exists, a brother's son may be superseded for a stranger, and even in Benares, and places where the Mimansa chiefly obtains, and where the prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto; the adoption of a brother's son or other near relation is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion, *Coleb.* cited in 1 *Stra. H. L.* 85; *Sir W. H. Macn. Prins. H. L.* 68.

Nanda Pandita declares that a woman may not affiliate a brother's son. If his opinion be correct, it might be consistently argued, that when a woman is proceeding to adopt with the sanc-

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tion of her husband or kindred, she must not select generally one with whose father she could not have legally married, *Datt. Miman.* sec. ii. § 33, 34; *Suthl. Synop. H. L.* Head 2.

If the woman does not act simply as the agent of the husband —as a passive instrument in making the adoption—this rule of *Nanda Pandita* appears unmeaning, for she does not adopt in that case for herself, but for her husband. If, on the contrary, she is more than a passive instrument; if by the circumstance of adoption, as would appear from texts already cited, she herself derives spiritual benefit, or, to use the expression of Hindoo jurists, "exemption from exclusion from heaven," her interest in adoption would appear to be greater than it is generally supposed to be.

We may refer to the ancient practice of appointing a brother or other near kinsman to raise up issue (*Kshetriya*) to a childless husband, *Menu.* ch. ix. § 59, although this practice was confined to Soodras by *Menu, ib.* § 64, who admits that it was fit only for cattle, and is reprehended by learned Brahmins, "yet it is declared to be the practice even of men while *Vena* had sovereign power," *ib.* 66, 2 Dig. Is not the permission of the husband to adopt based on this obsolete practice? May not the father of the boy be considered in the light of one appointed to raise up seed? In this view, the reason of the prohibition noticed by *Nanda Pandita* might be accounted for.

Can a married man, with reference to the prohibition of *Nanda Pandita*, adopt a boy with whose father the wife of such married man could not have intermarried?

SISTER'S SON.—"The daughter's son and the sister's son are declared to be the sons of Soodras, and may be affiliated by Soodras, *Datt. Miman.* sec. ii. § 74, 93, 95, 102 *n.*, sec. v., § 18; 1 *Stra. H. L.* 83, 84; *Datt. Chand.* sec. 1, § 17. In Madras a daughter's or sister's son may be adopted, 2 *Stra. H. L.* 100; *Stra. Man.* § 88. Such adoptions are allowed to all classes, at all events when no others are procurable, 2 *Stra. H. L.* 100; *Stra. Man.* § 87. For the three superior tribes the sister's son is nowhere mentioned as a son, *Datt. Miman.* sec. 2 § 74. Here even the term "sister's son" is illustrative, including all not resembling a son, for prohibited connexion is common to them all. Now, prohibited connexion is the unfitness of the son proposed to be adopted, to have been begotten by the individual himself, through appointment to raise issue on the wife of another, *Datt. Miman.* sec v. § 18.

The mutual relation between a couple being analogous to one, being the father, or mother of another connexion, is forbidden; as, for instance, the daughter of the wife's sister and the sister of the paternal uncle's wife. The meaning of the text is this: where the relation of the couple, that is, of the bride and bridegroom, bears analogy to that of father or mother, if the bridegroom be as it were the father of the bride or the bride stand in the light of

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mother to the bridegroom, such a marriage is a prohibited connexion, *ib.* § 19. The conclusion is, that one, with whose mother the adopter could not have legally married, must not be adopted. On examination of the texts, (§ 74, sec. ii.; § 19, sec. v.,) and other passages, it will be seen that the author entertained such contempt for the Soodra that he looked upon him as a slave, unworthy of any civil rights, but still laid down the broad principle that adoption can only be made of one with whose mother the adopter might have legally intermarried. He does not except the Soodra, nor does he show that a Soodra is at liberty to marry his sister. The decision of the High Court, presently quoted, draws no such distinction, notwithstanding the authority of the *Dattaka Mimansa*, inconsistent as that work is in this respect with the governing principle. We consider that it remains to be decided whether a Soodra can make a legal adoption of his sister's or daughter's son. See *post*, p. 40.

In the Andhra country, as in Bengal, a Brahmin cannot adopt his sister's son, *Nardsammai* v. *Balarama Charlu*, 1 *Mad. H. C. R.* 420.

A suit was brought by the appellant, a Hindoo widow, to recover certain immovable property belonging to her deceased husband. The defendant, Venkatummal, as mother and guardian of the respondent, a minor, contended he was entitled to the property, as the adopted son of the deceased. The plaintiff replied that the adoption was invalid, as the minor was the son of a sister of the deceased. The subordinate judge dismissed the suit, and the civil judge affirmed his decision. The opinions of the pundits of the Sudr. Court were taken, and they differed, one maintaining that amongst Brahmins a sister's son could not be adopted, the other that in the Dravida country the adoption of a sister's son is both sanctioned by law and recognised by custom. The civil judge affirmed the decision of the subordinate judge, holding that the sister's son was duly adopted, and as the boy had always lived with his adoptive father, it was a very natural and proper act. This decision was appealed from, and the appellant relied upon *Sutherland's Synopsis*, p. 223, the person to be adopted by a Brahmin must be one whose mother the adopted could legally marry, whilst the respondent relied upon *Strange's Man.* p. 22, § 86, Soodras may adopt daughter's or sister's sons, and § 87-89. *Holloway, J.*, in delivering the judgment of the court below, said the lower courts have followed an opinion of the late Mr Ellis, 2 *Stra. H. L.* 101. In practice the adoption of a sister's son by persons of all castes is not uncommon. The authority above quoted, resting as it does on a single text, and that not pointedly prohibitory, cannot be considered sufficient to vitiate such adoptions. On this opinion, and that of the senior pundit, that in the Dravida country the prohibition was not binding, the judgment of the lower court has gone.

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It is admitted on both sides that there is no judicial authority upon the subject, so that the case is one of first impression, and must be decided upon the principles of Hindoo law, unless it be shown that in the country of the parties that law has been modified by customs which have received judicial recognition. A very short experience will suffice to satisfy any judge that a pundit will always overcome a passage of Hindoo law too stubborn for other manipulation by the often baseless allegation of custom ; and, in our judgment, no custom, however long continued, which has never been judicially recognised, can be permitted to prevail against distinct authority. Now the passage quoted at page 101 distinctly forbids the adoption of a sister's son by one of the three higher classes, and the weight of the prohibition is increased by the addition of the doctrine that the sister's son may be adopted by a Soodra. *Mr Sutherland*, the greatest English authority on the subject, (p. 223,) lays it down as a fundamental principle that the person to be adopted must be one with the mother of whom the adopter could legally have intermarried.

Nanda Pandita lays it down in distinct terms that the daughter's son is not such a reflection of a son as can legally be taken in adoption ; and the commentator, *Dattaka Chandrika*, (sec. ii. § 8,) defines the reflection of a son as "the capacity to be begotten by the adopter through appointment, and so forth." It is manifest that the sister's son is not such an one.—Sec. v. § 18 of the *Datt. Mimansa.* "For the three superior tribes, a sister's son is nowhere [mentioned] as a son." And again, prohibited connexion is the unfitness [of the son proposed to be adopted] to have been adopted by the individual himself through appointment [to raise issue on the wife of another.] There exist, therefore, the very highest opinions in favour of the illegality of such an adoption; and to these is to be opposed the extrajudicial opinion of a gentleman, doubtless of great eminence, but still an opinion.

Mr Justice Strange, in the 2d ed. of his *Manual*, lays it down, "that usage has sanctioned the departure from the rule to the extent that there (the Madras Presidency) a daughter's or sister's son may be adopted. In the former edition, at p. 17, sec. 92, it was said, on the authority of extrajudicial proceedings of the Sudr.' Court, to prevail as a usage in South India—that is, the Dravida country ; and in sec. 94, quoting the opinion of a pundit of the Provincial Court of the Northern Division, it was stated that the usage did not prevail. This passage has been altogether omitted in the later edition, perhaps on the authority of the opinion given by the senior pundit in this very case.

The civil judge has shown by an old map that the country in which he was administering this supposed custom was not the Dravida country ; and there seems no doubt whatever that this is the case, and that the opinion of a pundit of the northern division, as to the non-existence of the custom there, was certainly of

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much greater weight than a vague statement such as that contained in the opinion of the Sudr. pundit. Dravida is the Tamil country, and Andhra is the name for Telingana. It is true that the family of languages spoken in the Presidency is called the Dravidian family, but this does not affect the meaning of geographical terms. . . . .

This is a case then in which it is sought to set up a supposed custom, which has never received the sanction of judicial authority,* against the express language of the greatest authorities. We are strongly of opinion that such customs cannot, even if proved to exist, operate in a court of justice bound to administer the law; more particularly is it the duty of the court to uphold a positive prohibition, when that prohibition is itself a logical deduction from the very nature of the subject to which it applies. The whole theory of adoption is the complete change of paternity. For the purposes of this case the son is to be considered as one actually begotten by the adoptive father. He is so in all respects, save an incapacity to contract marriage in the family from which he was taken.†

It is not uninteresting to observe that the same theory of relationship in the adoptive family was adopted in the Roman law. —*Item amitam licet adoptivam ducere uxorem non licet, Inst. Lib. I. tit.* x. 5.‡

We are unable, therefore, to agree that the text is not pointedly prohibitory; and even if there had been no such text, we are of opinion that, as being a logical consequence of the very nature of an adoption, the court would be bound to decide that such an adoption is invalid.

The learned judge comments upon the doctrine of the civil judge, that if not governed by the school which prevails here, (Madras,) he must be governed by the Bengal school, which would validate any act done; and adds, it is clear, however, that by the Bengal school of law this transaction would, as an adoption, be absolutely void.

In treating this adoption as an alienation, we further think the civil judge wholly unfounded, (*sic.*) It is true that a philosophical jurist of our own time has told us that an adoption is in Hindoo society a substitute for the will, which is of purely Roman invention, *Maine's Ancient Law*, 193; but to alter the disposition of property made by the law there must be an adoption. This is not one; the result therefore is the same as it would be if a man capable of disposing of property by will had executed a document, which from some defect was not a will. It could by no possibility be argued

* Custom has no such need.

† And to adopt his own natural brother, *S. A.* 27, 1858; *M. S. D.* 1858, p. 117.

‡ The natural son was always *cognatus* to his own blood relations, although by emancipation or adoption he might cease to be *agnatus* to them, *Sandar's Inst.* 149, 3d Ed.

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that the intent to alienate being clear, the attempting testator had actually alienated.

In Bengal a Hindoo (a Brahmin) cannot adopt his sister's son, as it imports incest, *Doe d Kora Shunko Takoor* v. *Bebee Munnee*, 1 *Mor. Dig.* 18, § 59; see *Datt. Miman.* sec. ii. § 91–93; *Datt. Chan.* sec. i. § 17; 2 *Stra. H. L.* 100; *Macn. Cons. H. L.* 149, 166. Nor in the north-west provinces.—See *Luchmeenauth Rao Naik Kaleyah* v. *Mt. Bhina Baee*, 7 *N. W. P.* 441, 443; see *Ramchunder Chatterjea* v. *Sumboochunder Chatterjea*, *Macn. Cons. H. L.* 167; *Mor. Dig.* 18, sec. 58. So a Brahmin widow cannot adopt her uncle's son, as she could not be his mother, *Dagumbaree Dabee* v. *Taramoney Dabee*, *Macn. Cons. H. L.* 170; 1 *Morl. Dig.* 19, § 60. In Madras it has been held there can be no adoption where there is such blood relationship between the adopter and adopted son's mother as would have prohibited marriage with her in her maiden state, *S. S. A. A.* No. 14, and 14, 1857, pp. 94, 96.

By the law and usage of Mithila such an adoption, even by persons of high caste, according to the *Kritrima* form of adoption is valid, 1 *Morl. Dig.* 19, § 61. Mr Morley, in a note to this case, says:—"The Datt. Miman. must be considered to refer only to the Datt. adoption, and not to the Kritrima form. The same point as in the above case was ruled by the Sudr. Court of Allahabad, 16th July 1833, in *Mt. Bala* v. *Mt. Botola*, in which the parties were Mithila Brahmins. It is presumable, from a part of the decree, (which generally upheld the validity of the Kritrima adoption of a sister's son,) that the parties were governed by the Mithila law, but this is not clear."

Adoption by a childless Hindoo Vysya, or a man of the third class of Hindoos, of his sister's son is valid, *Ramalinga Pillai* v. *Sudasiva Pillai*, 9 *Moore's In. Ap.* 506.

A Soodra may adopt the son of a sister, or even a daughter's son, 1 *Morl. Dig.* 18, n. 7; *Datt. Chand.* sec. i. § 17; *Mayukha*, ch. iv. sec. v. § 9. But *vide* p. 36.

Daughter's son.—A Brahmin having a daughter and daughter-in-law living, cannot adopt the son of a daughter pre-deceased; nor can such person so illegally adopted adopt his wife's sister's child, and make him heir to the grandfather's property, which would pass to the daughter-in-law on the Brahmin's death, and subsequently to the daughter, the daughter-in-law not being allowed to alienate the property during the daughter's life, *Baee Gunga* v. *Bayee Sheosunkur*, *Sel. Rep.* 73; 1 *Morl. Dig.* 18. A daughter's son and a sister's son are affiliated by Soodras, *Datt. Miman.* sec. i. § 17; *Datt. Chand.* sec. i., *sup.*; *Mayukha*, ch. 4, sec. v. § 9.

Exceptions to the rule.—There are, however, some strong exceptions in Madras, where usage permits a daughter's or sister's son to be adopted, 2 *Stra. H. L.* 101; *Stra. Man. H. L.* § 88, 89. The rule does not apply to Soodras, it being confined to the three superior classes, *Narada* cited in *Datt. Nir.*; *Sir W. H. Macn. Prins.*

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H. L. 67. This is in accordance with the texts of *Datt. Miman.*, which have already been observed upon.

ONLY SON.—It is said, *Suther. Synop.* 2d Head: "An only son cannot become an absolutely adopted son, (*Sudha Dattaka*,) but he may be affiliated as a Dwyamushyayana, or son of two fathers. In this case the reason of the prohibition—viz., extinction of lineage to the natural father—would not apply. An only son of the whole brother assuredly, if no other nephew exist for selection, must be adopted by his uncle requiring male issue, and is son of two fathers. . . . It may, however, be inferred that a legal impediment would exist to the affiliation by an uncle of a nephew whom his father had given away in adoption, as a Sudha Dattaka who retains no filial relation to his natural father."

The adoption of an only son is, when made valid according to Hindoo law, *Chinna Gaundan* v. *Kumara Gaundan*, 1 *Mad. H. C. R.* 54; *Veerapermall Pillay* v. *Narrain Pillai*, *Rajah of Tanjore; Arnachellam Pillay* v. *Iyasamy Pillay; Nundram* v. *Kashee Pande; Sreemutty Joymony Dossee* v. *Sreemutty Sibosoondree Dossee*, 1 *Morl. Dig.* p. 16, 17, § 37, 39, 41, 42, 43, 45.

THE RESULT OF THE AUTHORITIES.—The result of all the authorities, says *Sir Thomas Strange*, 1 *H. L.* p. 85, is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one, not being precisely him who on spiritual considerations ought to have been preferred.

The question was raised in the case of *Chinna Gaundan* v. *Kumara Gaundan*, 1 *Mad. H. C. R.* 54, whether the adoption of an only son is valid according to Hindoo law, and as the decision overrules the doctrine laid down in *Strange's Man. of H. L.*, it may be useful to give the reasons upon which Sir Colley Scotland, C. J., founded his judgment. His lordship says, "The only authority produced (in favour of the illegality of the adoption) is a passage from *Mr Justice Strange's Man. of H. L.* pp. 23, 24. But it must be observed that the passage in question is not supported by any cited authority, and on perusing it attentively, it is I think clear that the learned author must have been dealing with religious considerations strictly, and that when he says that the adoption of an only son is void, he means void from the orthodox theological point of view of the Shastras and commentaries, and as being likely in Hindoo belief to entail painful consequences in Put. But we are here to decide upon temporal rights, not to consider spiritual liabilities. And the application of the maxim *factum valet* to such a point as the present is wise, I think, and justified by many authorities, which quite preclude our giving effect to the conclusion stated in *Mr Justice Strange's Manual.*" After citing *Sir Thos. Strange*, (*H. L.* 85, *ante*,) his lordship continued with regard to both these prohibitions respecting an eldest and only son, where

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they most strictly apply, they are *directory* only, and an adoption of either, however blamable in the giver, would nevertheless to any legal purpose be good, according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindoo's, *factum valet quod fieri non debuit*, (p. 87.) Then there is the case of *Veerapermall Pillay* v. *Narrain Pillay*, with those of the *Rajah of Tanjore*, *Arnachellum Pillai Iyasamy Pillai; Nundram* v. *Kashee Pande; Sreemutty Joymony Dossee* v. *Sreemutty Sibosoondry Dossee*, all of which are noticed in the first vol. of *Morley's Dig.* p. 17, and all of which support Sir Thos. Strange's doctrine.

Referring to Mr Justice Strange's argument, I may observe that it rests on the assumption that it is the birth or adoption of the son that delivers the natural or adoptive father from the danger of Put. But surely this is erroneous. It is the son's performance of the father's exequial rites, not his birth or adoption, that relieves the father from the danger in question. Would the father, after the birth or adoption of a son, be considered as safe from Put if these rites were not performed, owing to the son's death, his loss of caste, or any other reason? If the mere birth of a son was all that was required, it would hardly be laid down, as it is, that on the death of such son the affiliation of another is indispensable, (*Datt. Chand.* i. 5.) Adoption takes place, according to *Atri*, (*ibid.* i. 3) for the sake of the funeral cake, water, and solemn rites; and according to Menu, for those objects, and also for the celebrity of the adoptive father's name; but not for the sake of the supposed efficacy of the mere act of adoption. If, then, the saving virtue lies solely in the performance of exequial rites, Mr Justice Strange's doctrine of the total expenditure on the natural father of the efficacy of his son's birth does not seem to warrant his conclusion. The adopted son may well perform his adoptive father's rites, and in certain cases it appears when he is a Dwyamushyayana, (or son of two fathers,) those of his natural father also. It cannot then be said that his adoption fails in its essential use, and is for this cause void. I may remark that the hostility shown in the Shastras to the adoption of an only son arose probably from other than mere religious consideration, the true reason is perhaps furnished by *Jagannatha*, *Coleb.* 3 *Dig.* 243, who lays down the law thus :—"Let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct." But this, he goes on to say, does not invalidate the adoption of such a son actually given to him."*

Mr Justice Strange certainly cites no authority for his opinion, that as the very birth of a son delivers the father from danger of Put, the eldest or only son as he comes into the world secures this deliverance to his parent. The son can, however, secure no more. The efficiency of his birth has been expended on his natural father, and

* As to the validity of the adoption of an eldest son, see *R. A.* 49 of 1853; *M. S. D.* 1854, p. 31; *Abajee Dinkur* v. *Gungadhur Wasdeo Gosavee*, 3 *Morris Bomb. R.; S. D. A. R.* 420, 424.

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is not available for another; he cannot effect a second deliverance from the danger of Put on behalf of another, neither can the benefit already insured be withdrawn from the natural father, and conferred upon another; the adoption of an eldest or an only son would hence avail nothing to deliver the adoptive father from Put. The adoption would fail in its essential use, and be for this cause void.

But although no authority has been cited in support of this doctrine, authorities supporting it are to be found. Mr Sutherland, referring to *Menu*, chap. 9, § 106, in § 5, sec. i., of his translation of the *Datt. Chand.*, renders that passage of *Menu* thus, "By the eldest, at the moment of birth, a man becomes father of male issue, and absolved also from debt to his progenitors." The passage thus rendered is translated by Sir W. Jones as follows:—"By the eldest, at the moment of his birth, the father having begotten a son, discharges his debt to his own progenitors." § 107 *ib.* is still stronger, "That son alone by whose birth he discharges his debt, and through whom he obtains immortality, was begotten from a sense of duty." On this account the Hindoo law provided certain privileges to be conceded to the elder brother. These texts, in our opinion, support Mr J. Strange's view. Although it has been objected religious considerations ought not to be weighed in deciding on temporal rights, we are of opinion that adoption is so intimately connected with the Hindoo religion, that the religious element cannot be entirely excluded in dealing with a question of this nature. Sir Colley Scotland lays down the doctrine that it is the son's performance of the father's exequial rites, not his birth, or adoption that relieves the father from the danger of Put. This is certainly not the opinion of Menu. The questions are asked, "Would the father, after the birth or adoption of a son, be considered safe from Put if these rites were not performed, owing to the son's death, his loss of caste, or for any other reason? If the mere birth of a son were all that was required, it would hardly be laid down, as it is, that on the death of such son, the affiliation of another is indispensable." Menu replies, at the *moment* of his birth the eldest son discharges his father's debts, and through him his father attains immortality. If the father were to die immediately after the birth of the son, and the son immediately after the death of the father, we presume the son's birth would have secured the immortality of the father even without the performance of a single ceremony. Adopting the doctrine of Menu, we think that *Mr J. Strange*, § 51 of his *Manual*, gives a satisfactory reason for adoption after the death of the natural son, where, he says, one who has become sonless by the death of a son, though freed from the danger of Put by the son he has had, may, nevertheless, adopt a son to perform his funeral rites, *and keep up his line.* Mr Strange's view is supported by *Jagannatha*, who, in 3 *Dig.* pp. 289–293, discusses the question, "If one who

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has a son legally begotten adopt a son given, is the adoption valid or not? and what occasion is there for its validity since the obsequies must be performed by the son legally begotten?" After arguing in support of the validity of such adoption, *Jagannatha* observes, at p. 293, "But here the intention of the precept is to forbid adoption, then only when there is no motive for it, for the benefit desired, namely, deliverance from the Hell called Put, is obtained without adopting a son given, and through him therefore that purpose is not effected, but one who desires numerous issue for other purposes besides deliverance from the Hell called Put may adopt a son given and the rest, although he have one legally begotten." Whether an adoption under such circumstances would be upheld by the Indian courts is a matter of question. However that may be, the reasoning of Jagannatha draws a distinction between the efficacy of a son born, and the reason of desiring another son to supplement him. In Bengal, where the treatises on adoption followed in Madras are treated with equal respect, the Pundits were of opinion that the adoption of an only son is illegal, as the gift and acceptance of an only son are both prohibited, without which formalities a Dattaka adoption cannot be carried into effect. The following passage from Vasishtha is in accordance with the text of Jagannatha, referred to in the judgment of the High Court, and supports the view taken by the learned judge in respect of the object of adoption, though opposed to the doctrine of Menu—"Let no man give or accept an only son, since he must remain to raise up progeny for the obsequies of ancestors." 1 *Macn. Prins. H. L.* p. 67, in the text says that the party adopted should neither be the only nor eldest son, referring to Vasistha, Dutt. Nir., and Menu; but observes in a note, this is an injunction rather against the *giving* than the *receiving* an only or elder son in adoption, and the transfer having been once made it cannot be annulled. This seems, under one view, reasonable, considering that the adoption having once been made, the boy, *ipso facto*, loses all claim to the property of his natural family; but, on the other hand, if the adoption be not strictly legal, the boy loses no interest in his natural family. In support of his opinion *Macnaghten* refers to the case of *Huebut Rao* v. *Govind Rao*, Bombay Reports, vol. ii. p. 75, 1 *Morl. Dig.*, 13. With respect to the reason assigned as to the *receiving*, it has been decided by the Madras High Court that the natural rights of the person adopted remain unaffected when the adoption is invalid, *Bawani Sankara Pandit* v. *Ambabay Ammal*, 1 *Mad. H. C. R.* 363. If the doctrine of Menu is to be followed, the adoption of an eldest son can confer no spiritual benefit, and if on that account it be held invalid, the boy so adopted would have rights of inheritance in his natural family.

DWYAMUSHYAYANA.—*Sir Thomas Strange, H. L.* 86, says that the son of a brother adopted by his uncle becomes a Dwyamushyayana; and at pp. 99, 100, he applies the same term to the son of a different

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family when at the time of the adoption a special agreement may have been entered into that the adopted son should not cease to belong to his natural parent's father. He cites *Mitacshara*, chap. 1, sec. x. § 1, 13; sec. xi. § 9; vol. ii. pp. 118, 202, of his own work; and *Sutherland's Synopsis*, title, Qualification and Right to be Adopted, in the fourth paragraph of which the word Dwyamushyayana, or son of two fathers occurs, and is apparently used in reference to the authorities there cited. *Macnaghten*, i., pp. 70-76 concurs generally in the view taken by *Sir Thomas Strange.*

It will be found that the *Mitac.* ch. 1, secs. x. xi., confines the term Dwyamushyayana, or son of two fathers, to a son begotten by one on the wife of another man. In note 1, the translator observes that the Dwyamushyayana is restricted in this section to one description of adopted son—viz., the Kshetraja, or son of the wife, but the term is applicable to any adopted son retaining his filial relation to his natural father with his acquired relation to his adoptive parent, and in support of this view refers to sec. xi. § 32 of the same chapter of the *Mitacshara*, which has no reference to the subject.

Mr Sutherland says an only son cannot become an absolutely adopted son, (Sudha Dattaka), "but he may be affiliated as Dwyamushyayana, or son of two fathers." In support of this he refers both to the Mimansa and Chandrika. The former prohibits the adoption of an only son, but recognises the adoption of the only son of a brother. At sec i. § 31, the author uses the word Dwyamushyayana apparently as applicable to all adopted sons, and instances the example that marriage may not take place in either family. But in the note at § 33, enumerating the several descriptions of sons, the Dwyamushyayana is not mentioned as a distinct son; on the contrary, the Kshetraja, or son of the wife, is mentioned, and, according to the *Mitacshara*, that term is applied to the Dwyamushyayana, or son of two fathers. It does not appear that the author of the *Mimansa* uses that term in a sense inconsistent with the definition in the *Mitacshara.*

In the *Datt. Chandrika*, sec. i. § 27, 28, we likewise find the word Dwyamushyayana used. In § 27 the author refers to the affiliation of a brother's only son, whom in § 28 he considers in the light of a Dwyamushyayana, or son of two fathers, supporting his opinion by reference to the story of the adoption of Suvesa by Bhairava and Vetala, referred to at length in sec. ii. § 45 of the *Mimansa.* In section ii. of the *Chandrika*, § 24–42, the author discusses the question whether the term Dwyamushyayana should be confined to the Kshetraja, son of the wife, or whether it extends likewise to an adoption made on a special agreement, stipulating that the son adopted should be the son of the natural as well as the adopting father. He concludes the question in favour of the latter proposition, and at sec. v. § 33, he lays down the rule that, "The son given, who is Dwyamushyayana, if both his adoptive and natural parents

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have no other male issue, takes the whole estate of both; one adopted, where legitimate issue of the adopter existed, does not participate in the estate of the adopter, but a legitimate son being born to the natural father subsequent to the adoption, the adopted son takes half of the share of a legitimate son. If, however, such issue be subsequently born to the adopter, the adopted son in question takes half of the share which is prescribed by law for an adopted son exclusively related to his adoptive father, where legitimate issue may be subsequently born to that person." In support of this view, in § 34, the author quotes the following text from *Narada*, "Let those, being sons to both fathers, present separately to each, oblations of food and water; they take the half of a share in the estate of the contributor of the seed and owner of the soil." The author complacently remarks, "It has been before said that the terms contributor of the seed and owner of the soil are illustrative severally of the natural and adoptive fathers."

In our opinion, the text of *Narada*, so far from supporting the view of the author, *Devanda Bhatta*, is absolutely contradictory. *Menu* is in accord with *Narada*; and the author himself, at § 35, sec. xi., where he sets forth the argument against this position, evidently betrays a consciousness of the weakness of it.

If we examine sec. iii. § 1–17, with attention, we find that he only treats directly of two descriptions of sons, viz., the legitimate son and the son of the wife, Kshetraja. Indirectly he refers to the son of a stranger. As far as our researches lead, it would appear that the Dwyamushyayana, as the son of a stranger, and not of a brother, or of a wife, is unknown to the older writers. The *Mitacshara*, ch. 1, sec. xi. § 4, and notes; 3 *Dig.* 204, 206,* certainly recognise no son of that description under that name. Both *Menu* and *Narada*, when alluding to the son of two fathers, evidently had in view the son of the wife. From the *Datt. Chandrika* it may be gathered that a man who has no other male offspring may give his son in adoption. The gift and acceptance of an only son were expressly forbidden by the earlier writers; and since they mention nothing of a Dwyamushyayana of this description, the recognition of such a son would appear to depend solely upon the opinions of later commentators. The question, therefore, is, whether their opinions should be followed in preference to the sources of the law, particularly in a way calculated to operate injuriously. For, if sons were born to the natural father after the adoption, the Dwyamushyayana, at § 23, sec. v. of the *Chand.*, is declared entitled to share the estate of the natural father with them. This is contrary to the text of *Menu*, cited at sec. xi. § 35, the adopted son must never claim the family or estate of his natural father. In the case of *Chinna Gaundan* v. *Kumara Gaundan*, 1 *Mad. H. C.*

* The *Mayukha* blindly follows the *Chandrika*, and refers, as an authority in support of its views, to the *Mitacshara*, which differs from the *Chandrika*.

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R. 54, it was contended, on behalf of the appellants, that in the Benares school the adoption of an only son is invalid, unless the natural father deliver the son to the adoptive father *on the condition* that he should belong to both of them as a son, and the latter accepts and adopts him *on that condition.* The learned C.-J. Scotland cited a case to show that such a condition *will be inferred* after the adoption has been performed; we are therefore to conclude that in that case the condition had not been proved, and, on the authority of his Lordship, that without such proof the adoption of an only son will constitute a Dwyamushyayana, and as such the youth adopted will have a right to participate, according to the *Chandrika*, not only in the property of his adoptive, but also in that of his natural father, though he may have natural brothers.

ORPHAN.—An orphan cannot be adopted. *Subbaluvammal* v. *Ammakutti Ammal,* 2 *Mad H. C. R.* 129; *In Veerapermall Pillay* v. *Narrain Pillay,* 1 *Stra. Notes of Case,* 91, it was held that where both parents were dead a child might be given in adoption by his elder brother, *ante,* p. 33. But this position is contested by *Sir F. Macnaughton,* in his *Considerations on Hindoo Law;* and his citations, p. 210, from *Coollooca Bhattu*, *Vachespati, Misra,* and the *Aditya Purana*, certainly seem to show that an orphan cannot be adopted. To constitute a valid adoption there must be a *giving* as well as a *receiving.* Here there seems to have been no one to give the child. No amount of ratification can supply the absolute essentials of a transaction like the present.

ILLEGITIMATE SON.—An illegitimate son cannot be adopted.

WHETHER AN ADOPTED SON MAY BE GIVEN IN ADOPTION.—This is a question which has not, so far as our researches extend, come under judicial decision. There appears to be objection to such an adoption, for the performance of the religious ceremonies might operate as an obstacle. There might, moreover, be fraud upon the lad himself; and as the virtue to deliver from Put was expended on his first adoption, he could confer none by his second adoption.

SAME CASTE AS ADOPTER.—The canon requires that the adopted son should be of the same caste as the adopter, *Menu,* chap. 9, § 168, because the religious purposes of the adoption would fail as to the performance of ceremonies, the inheritance of property, &c.

SAME GOTRA OR FAMILY.—It is said, moreover, that he should be of the same gotra, or family, but this is not imperative, 2 *Stra. H. L.* 98; and opinions of *Coleb.* and *Ellis, ib. Sutherland's Synop.* 223, 224. Amongst the Soodras, a childless Hindoo may adopt a son from a gotra or family different from his own, *Rungama* v. *Atchama,* and *Atchama* v. *Ramanadha,* 4 *Moore's In. Ap.* 1. And, as usual, the relaxation has affected the Brahmins, so that now it is merely a matter of conscience that a near relation should be adopted. No court of law would annul the adoption of a stranger

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merely on that ground, if he were not otherwise excluded, as by caste.

NATURAL BROTHER—ADOPTED SON CANNOT ADOPT HIS NATURAL BORN BROTHER.—A boy after adoption cannot adopt his natural brother, such an adoption would be invalid under the first canon, see *Sud. Dec.* of 1858, p. 117; nor can the natural born brother inherit property from his brother acquired by the adoption, see *post*, p. 51.

A GIRL.—Dancing girls may adopt, but only girls. *Morley* doubts whether such adoption is valid.

Mr Justice Strange, in his *Manual of Hindoo Law*, p. 25, § 98, 99, says:—Dancing girls form an exception in Hindoo community. They do not marry, but live in professional concubinage, which does not degrade them from caste if not carried on with an out-caste. Having no husbands, adoption cannot be made in that channel; they are consequently allowed to make adoption themselves for transmission of their property; and this must be of daughters, for descent from females is in the female line. To adopt, the dancing girl must accordingly be daughterless. It is immaterial whether she have a son or not.

If this adoption is made for the transmission of property only, there may be some reason for Mr Morley's doubts, for this object may now be attained by testamentary disposition. In *Chalakonda Alasani* v. *Chalakonda Ratnachalam*, 2 *Mad. H. C. R.* 56, the adoption of the defendant by the appellant, a dancing girl was alleged and admitted, and the suit proceeded to trial on the assumption that the family was undivided.

AGE BARS ADOPTION.—The age in this case is determined generally by the religious ceremonies performed at different periods among different castes. *Sir Thomas Strange*, p. 89, says, that the ceremonies performed by the family, and in the name of the father, constitute the act of affiliation, the fewer of them that have been performed previous to adoption the better, the more nearly does he come into the position of a natural son.

Two ceremonies, chudavarana, tonsure or shaving the head, and the Oopanayana, or investiture with the thread, in general prevent adoption. But here the authorities differ, *Sir Thos. Strange*, p. 91, holds that Oopanayana can be annulled, and the effect of this is that a re-investiture can be gone through; while *Mr Strange*, in his *Manual*, holds a contrary opinion, *Stra. Man.* p. 26, § 102.

Mr Ellis says, 2 *Stra. H. L.* 104, with respect to the ineligibility of a person for adoption upon whom the Oopanayana rites have been performed, it is much disputed; the more correct, because the more reasonable opinion would appear to be that he is eligible, if of the same gotra; (family,) ineligible, if of a different one from the adopted; for if of the same gotra, the *Datta-homam*, though proper, is not necessary, and it cannot be performed on one who by the rites of the Oopanayana has been definitively established in his

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natural gotra. The weight of authority is against the validity of the adoption of one upon whom this rite has been already performed. There is no authority on the other side, *P. Venkatesaiya*, *M. Venkata Charlu*, 3 *Mad. H. C. R.*, 28.

TONSURE, REMOVAL OF.—According to Morley the effects of tonsure may be removed for the purposes of adoption, 1 *Morl.* p. 21, § 79; *Mr Strange* (*Man.* p. 26, § 102) thinks tonsure would not prevent adoption, since it can be performed in the adoptive family.

OOPANAYANA should be performed among the Brahmins at the age of eight; among Cshetriyas at eleven; among Vysyas at twelve, *Reg. Ap.* 18 of 1814, Sudder Court. This does not apply to Soodras, 1 *Stra. H. L.* 91. According to Jagannatha, the ceremony of tonsure constitutes an absolute prohibition against any adoption whatsoever of one whose age exceeds five years, on whom the initiatory rite of tonsure may have been performed in the family of his natural father, *Dig.* chap. 4, sec. viii.; and in *Kerut Naraen* v. *Mt. Bhobioesree*, cited in *Sutherland's Synopsis Hindoo Law-books* by *Stokes*, p. 666, in which the adoption of one older than five years was contended to be illegal, on the opinion of the pundits,—declaring, according to the Hindoo law as received in Bengal, the adoption of such person to be legal, provided the initiatory rites (Sanskara) in the family of the natural father have not been, and in that of the adopter be performed—the *S. D. A.* appears to have determined the following points as applicable to Bengal, where it should be observed that the Dattaka form of adoption chiefly, if not solely, prevails;* 1st, That adoption is restricted to no particular age; 2d, That one initiated in tonsure in the name and family of his natural father is incapable of adoption; 3d, That the age of the person selected for adoption must be such as to admit of the ceremony of tonsure being performed in the adopter's name and family.

The limitation of adoption to any particular age is thus overruled, (so far as Bengal is concerned.) But without meaning to question, as applicable to Bengal, the accuracy of the other two points of law resulting from the decision referred to, there is no impropriety in expressing a doubt whether they can be received as constituting a general rule universally decisive on the questions which they regard. 1st, Such rule would be at variance with the doctrines of *Datt. Miman.* and *Datt. Chand.*; 2d, The authenticity of the passage attributed to the Kalikapurana, on which the opinion of *Jagannatha* and the *Pundits* of the *S. D.* is founded, is justly denied, and it is interpreted as admitting the adoption of one, although initiated in tonsure by his natural father; 3d, The received definition of the Kritrima son, and particularly the mode of affiliation current in the Mithila country, obviously refer to

* In Gaura or Bengal, and most countries other than Mithila, sons are only adopted in the Dattaka form. But such practice should not vitiate a *Kritrima* adoption, unless that mode were prohibited by works on law of paramount local authority, *Dig.* chap. 10, sec. x.

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one of years somewhat mature, who, if not necessarily, would mostly be initiated in tonsure by his natural father, and the adoption of such a person is certainly justified by practices obtaining in some parts of India. *Suthl. Synopsis, ib.* 666.

The difficulty, or rather impossibility of defining any unvarying principles universally decisive on these subjects, is obvious. The most general and consistent rule which presents itself is this—Any person on whom the adopter may legally perform the Oopanayana rite is capable of being affiliated as a Datt. son, while one not so qualified may be lawfully adopted as a Kritrima son, *ib.* 2nd head.

Sir Thomas Strange says, vol. 1, p. 91 :—"But if in the classes to which they apply they (*Tonsure* and *Oopanayana*) have been performed for the adopted in his own family, a remedy is found in the *putreshti*, or sacrifice by fire, by recourse to which they may be annulled, so as to admit of their re-performance with effect in the family of the adopter, who is thus enabled to perfect the test upon which he relies for the continuance of his name, and the solemnisation of his obsequies," *Datt. Miman.* sec. iv. § 40, 49; *Datt. Chand.* sec. ii. § 27, 32; *Mitacsh. on Inh.* note to chap. I. sec. xi. § 13; *Suthl. Synop.* note 9, p. 225; 3 *Dig.* 149.

Whether illegal adoption curable.—An adoption originally illegal, it is said, may be cured by lapse of time and the acquiescence of the parties concerned. But this will evidently be overruled, as it is very questionable law, *Mad. Dec.* of 1854, p. 36; of 1858, pp. 84, 89. Undisputed possession by the defendant, an illegally adopted son will protect him only under the statute of limitations. If he were plaintiff, for the same reason, he could not recover rights enjoyed by others. Nor in any case if he held his property for a time shorter than that required by the statute, could he deprive others of property.

Marriage.—All castes agree that marriage is an absolute bar, *Ranee Sevagamy Nachiar* v. *Streemathoo Heraniah Gurbah*, 18 of 1814, 1 *Mad. Dec.* 101, 106, *P. C.* 28th April 1828; 1 *Stra. H. L.* 35 n. and 91; not being capable of annulment like tonsure or Oopanayana, 1 *Stra. H. L.* 91; 2 *ib.* 87; 1 *Bomb. R.* 196; *Chetty Colum Prusunna* v. *Chetty Colum Moodoo*, 1 *Mad. Sel. Dec.* 406.

Soodras.—With Soodras marriage is the only obstacle, *Chetty Colum Prusunna* v. *Chetty Colum Moodoo*, 7 of 1823; 1 *Mad. Dec.* 406.

Semble.—In Bombay a man of mature age, married, and having a family, is admissible to be adopted, he being a Sagotra, *Mayukha*, chap. 4, sec. 5, par. 19; *Sree Brighookunjeee Muharaj* v. *Sree Goohoolootsaojee Maharaj*, 5th Nov. 1817, 1 *Borr.* 181; 1 *Morl. Dig.* 17, § 46, *Chetty Colum Prusunna* v. *Chetty Colum Moodoo, contra* in Madras, *supra*.

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Section VI.

Effect of Adoption.

The relationship with natural family ceases—Adopted son becomes as a natural born son—Rights and duties in adoptive family—Exception—Adopted son loses his natural rights—Succession to property of childless adopted son—Invalid adoption—Right to maintenance—Cannot intermarry with either family—Second adoption—Disinheritance on adoption of second son—Cancellation—Limitation—Whether one member of a family can inherit property of one taken out of that family—Adoption by widow—Sale of property by widow previous to adoption—Adoption by widow under power—Death of adopted son—Widow his heir—Effect of Kritrima form of adoption—Need not be in writing—Intention.

The relationship with natural family ceases.—According to *Sir Thomas Strange*, p. 97, when a father gives away his son after the rites of initiation, his relationship with his own or natural family ceases, and a relation to the adopter commences, *Jagannatha*, 3 *Dig.* 149, 150. His relationship with his own family is replaced by the new relationship with that family into which, in effect, he is transferred. He is completely regarded as a natural son, and not only so, but he is taken into the family. He becomes connected with it both lineally and collaterally, 1 *Stra. H. L.* p. 98. Thus he inherits from any lineal and collateral branch the property to which he would have succeeded if he had been a natural born son, *Manu.* ch. 9, sec. 159. He acquires the rights of a son in the hereditary immovable property of the adoptive father, of which he cannot be deprived by assuming to adopt a second son, and settling the hereditary property upon him, with a declaration that the first was disinherited, *Sudanund Mohapattur* v. *Bonomallee*, 1 *Begl. H. C. R.* 317.

The adopted son becomes as a natural born one. — The theory of adoption being a complete change of paternity, the son is to be considered as one actually begotten by his adoptive father, and he is so in all respects save one, an incapacity to contract marriage in the family from which he was taken, *Narasammal* v. *Balaramacharlu*, 1 *Mad. H. C. R.* p. 420; *Mr Holloway, J.* See *ante*, p. 38, n.

Rights and duties in adoptive family.—His position is therefore that of a son begotten. Being transferred from his own family, he becomes as the natural son of the adopter, and enjoys the right of succession in his new family, with the duty of performing for his adoptive father his exequial rites and ceremonies, *Datnurean Sing* v. *Buckshee Sing*, *Beng. Rep.* 1805, p. 16 ; *Kullean Sing* v. *Kirpa*

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Sing, *ib.* p. 10; 3 *Dig.* 184, 185, and his right of succession attaches to the entire property of the adopter, real and personal, *Beng. Rep. ib.* p. 10, and self-acquisitions undisposed of by the father.

He is to all intents and purposes, therefore, a natural son. Of course if the father of the adopter is disabled from inheriting, by reason of any of the established causes of disqualification, the son can have nothing to inherit through his adoptive father; in that case he is only entitled to maintenance, *Datt. Chand.* sec. vi. § 1.

This rule must be taken with a qualification which a fair construction of the Hindoo law authorises. On birth, a son becomes partner with his father in the family property. At the instant of birth he confers a benefit on his father by delivering him from Put, and being in existence to perform exequial rites; at the same time, he inflicts a correlative injury on his father by becoming a sharer in the family property, and he cannot be deprived of his share without his consent. A son therefore possesses two rights—one as partner in his own share of the family property; and one as heir, entitled to succeed to his father's share on his father's death. Consequently, if his father is disqualified from inheriting from his ancestors, or relatives, the adopted son cannot be placed in a better position than himself. It is, however, but reasonable to conclude that the son is entitled to succeed to the property to which his adoptive father on the principle explained was entitled.

Exception.—The right of inheriting by the adopted son is subject to the rights of a natural son born after the adoption, in which case he is entitled in compensation to one-fifth and the natural son to four-fifths of the property, *Jagannatha*, 3 *Dig.* 290–292; *Datt. Chand.* sec. v. § 19, gives them one-third and two-thirds. *Sir W. H. Macn. Prins. H. L.* 70, says, the adopted son takes one-third according to the law of Bengal, *Srinath Serma* v. *Radhakaunt*, and *Dutt. Narain Singh* v. *Roghoobeer Singh*, 1 *S. D. A. R.* pp. 15, 20. In *Ayyavu Muppanar* v. *Miladatchi Ammal*, 1 *Mad. H. C. R.* 45, it was held that in Southern India he was entitled to one-fourth of the other's share of the property. *Sir Thomas Strange*, vol. i. p. 99, says, that amongst Soodras both share equally the parental estate.

Adopted son loses his natural rights.—And so on the other hand the adopted son is transplanted out of his own family, and consequently loses his rights therein.

The adoption once completed, the son adopted loses all claims to the property of his natural family; but the estrangement does not extend to the social relations. Thus he cannot marry within the prohibited degrees in his natural family. With regard to mourning, &c., the family connexion still subsists, *Sir W. H. Macn. Prins. of H. L.* 69. This learned author, *ib.* note, says—"It has been asserted by the author of the *Elements of Hindoo Law*, that a son adopted in the ordinary way, though he cannot marry among his adoptive, yet may marry one of his natural relations; but I cannot find any authority for this doctrine. He seems to have inferred it from the text of *Parijata*, 'Sons given, purchased, and the rest who

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are sons of two fathers, may not marry in either family, even as was the case of *Singa* and *Saisira;*' that adopted sons not bearing the double relationship might do so; but the inference is clearly untenable. Indeed, *Mr Sutherland*, to whom he refers as his authority, expressly declares in his *Synopsis*, p. 219, that the adopted son cannot marry any kinswoman related to his father and mother within the prohibited degrees, as his consanguineal relation endures," *Sir W. H. Macn. Prins. of H. L.* 69, note.

SUCCESSION TO PROPERTY OF CHILDLESS ADOPTED SON.—When an adopted son dies without issue, property which he has inherited from his adoptive father goes to the natural heirs of the latter, *S. A.* No. 71 of 1858; *M. S. D.* 1859, p. 265. His own father cannot claim to inherit from him, but the widow of the adopting father will succeed to the property, if he himself leaves no widow, *Sir W. H. Macn. Prins. H. L.* 69.

INVALID ADOPTION—RIGHT TO MAINTENANCE.—So complete has this severance from his natural family been supposed to be, that it has been said he cannot inherit their property, even should the adoption be altogether illegal, and that he can claim maintenance only from the new family into which he has been supposed to have been engrafted, *Stra. Man.* § 119. But this unreasonable and illogical doctrine has been overruled in the case of *Bawani Sankara Pandit* v. *Ambabay Ammal*, 1 *Mad. H. C. R.* 363, where it was held that the adopted son of one whose alleged adoption has been invalid, has no claim to be maintained by the alleged adopter, and that an invalid adoption does not sever the person so adopted from his natural rights.

In that case, the defendant, a widow, without authority, went through the form of adopting Kistnaji Koneri Pandit, who adopted the plaintiff Bawani, who brought a suit as adopted son to recover from the defendant the property left by her husband; but his alleged adoption was of no validity, on the ground that though the forms and ceremonies of an adoption appeared to have taken place after the death of the defendant's husband, the defendant had no authority whatever from her husband to adopt. The plaintiff, Bawani, sued the defendant for a sum of money alleged to be due for his and his adoptive mother's maintenance, and the principal Sudr Ameen decreed, and the decision was affirmed by the civil judge, that the alleged adoption was invalid, for the reasons above stated. This decision was appealed from, and on the argument it was contended, that as an invalid adoption of a son severs the right to inherit from his natural father, he has a right to maintenance from his alleged adoptive father, citing *Stra. Man.* § 119, 197; 1 *Stra. H. L.* 82; *Datt. Chand.* sec. i. cl. 14, 15; sec. vi. cl. 4.

In delivering judgment, *Chief-Justice Scotland* said, "In reason and good sense it would seem hardly a matter for doubt, that where no valid adoption, in other words, no adoption has taken place,

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no claim of right in respect of the legal relationship of adoption can properly be enforced at law." But in this case it was contended on the part of the appellant, that although Kistnaji Koneri Pundit was precluded from all right to inherit in the family of the defendant's husband; yet that, by reason of the forms and ceremonies attending an adoption having been gone through, the law gave him a right to claim maintenance from the defendant, and that such right passed to the appellant as his son by a valid adoption, just as it would have passed to his natural son. In support of this, reference was made to *Mr Strange's Manual*, secs. 120, 197; 1 *Stra. H. L.* 82; and to the *Dattaka Chandrika*, by *Mr Sutherland*, sec. i. cl. 14, and sec. vi. cl. 4.

The passages in the two former works rest upon the authority of the *Dattaka Chandrika* and the *Mitacshara* on inheritance, ch. 1, sec. 11, cl. 9,* and having considered what is to be found in these authorities, we are of opinion that no legal ground is afforded for the present claim to maintenance. *Mr Justice Strange*, in sec. 119 of the 2d edit. of his *Manual*, no doubt states broadly that a boy, after a gift made for adoption, cannot be re-admitted to his family rights should his adoption "not stand good in law," and that devoid of inheritance he has a claim for maintenance; and an observation to the same general effect occurs in a late judgment delivered by Mr Strange, while a judge of this Court, *Ayyavu Muppanar* v. *Níládatchi Ammal*, 1 *Mad. H. C. R.* 45. But Sir Thomas Strange's observations are confined to the adoption of one of a different class from the adopter, and he puts the claim to maintenance on the ground that such an adoption, while it divests a child of his natural claims, does not entitle him to all the incidents of an exceptionable adoption, and enable him effectually to perform those rites which are essential to the right to inherit; and this in effect is supported by the *Dattaka Chandrika*, sec. i. cl. 14, 15. When, however, both the authors and the commentators to whom he refers make the claim of adopted sons of a different class more expressly and distinctly to rest upon the ground, that although not qualified to present the oblations and perform the rites essential to inheritance, they acquire a filial relationship, (as is there said,) "by reason of their being beneficial in perpetuating the name and the like; but as they are beneficial in a small degree, they only receive maintenance. See also the *Dattaka Mimansa*, sec. 3. The doctrine so laid down treats the adoption as one that may be made, and existing, and of validity for one of the purposes of adoption,

* He who is given by his mother without her husband's consent, while her husband is absent or incapable, though present, or without his consent after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given (*Dattaka*) son. So *Menu* declares he is called a son given (*Dattrima*) whom his father or mother affectionately gives as a son being alike by class, and in distress confirming the gift with water. *Mitac.* ch. 1, s. xi. § 9.

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according to *Menu*, quoted in clause 3 of the same section, though not for the other purpose of the funeral cake, water, and solemn rites." How far this doctrine now holds good as law, we are not called upon to consider, as it has, we think, no application to the present case. But we may observe that there appears to be nothing in the *Mitacshara* to the same effect, and Sir Thos. Strange, in a note to the passage referred to, questions the claim to maintenance, and says, Mr Sutherland, translator of the *Treatise on Adoption*, being of opinion that the adoption being void, the natural rights remain ; and applied to the present case, this opinion of a very high authority upon the subject is entitled to more weight that it is clearly logical. If there were no adoption, nothing can have been acquired, and nothing lost.

In the present case, the question does not turn upon any personal disqualification on the part of Kistnaji Koneri Pandit, and we think the natural rights of the plaintiff remain in law quite unaffected. In this case, the authority of the defendant's husband was indispensable to the adoption relied upon by the plaintiff; without it the absolute essentials of adoption for civil purposes, the giving and receiving, could not with any legal effect take place; and it would be strangely inconsistent and unreasonable, if the mere formal performance of certain customary rites and ceremonies connected with adoption, which, as regards the civil rights of the person adopted, would probably not be treated as necessary to its legal efficacy, 1 *Stra. H. L.* 96; *Veeraperumal Pillay* v. *Narrain Pillay*, 1 *Stra.* No. of Cas., 100, were held to confer the right to enforce maintenance by a civil court. We think there is nothing in Hindoo law which requires, or would warrant such a decision, and that, as in this case, there was no valid adoption by the defendant, the suit must fail.

CANNOT INTERMARRY WITH EITHER FAMILY.—He is, however connected in only one case with both families, for he cannot marry within the prohibited degrees in either family, being by birth and a fiction of law related to both, and can therefore neither marry nor adopt within the circle of prohibition, *Mad. Dec.* 1858, p. 117; *Stra. Man.* § 118; *Narasammal* v. *Balaramacharlu*, 1 *Mad. H. C. R.* 420. In this case it is laid down that the theory of adoption is a complete change of paternity. The son is to be considered as one actually begotten by the adoptive father, and he is so in all respects save an incapacity to contract marriage in the family from which he was taken, see *ante*, p. 38, n. 51.

SECOND ADOPTION.—We have seen that no second adoption can be made during the life of the one first adopted, *ante*, p. 27.

DISINHERITANCE ON ADOPTION OF SECOND SON.—When a Hindoo has adopted a son, the adopted acquires the rights of a son in the hereditary immovable property of the adoptive father, and he cannot be deprived of those rights by the adoptive father afterwards assuming to adopt a second son, and settling the hereditary property upon

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such second adopted son, coupled with the declaration that the first son was disinherited, *Sudaund Mohapattur* v. *Bonomallee*, 1 *Beng. H. C. R.* 317.

A childless Hindoo adopted A. as his son. Afterwards he adopted B. as his son, and made a will dividing his property, ancestral as well as acquired, between A. and B. A. filed a petition denying the right of his adoptive father to adopt B., and protesting against the will; but afterwards he signed a consent to the will:—held that as the father afterwards endeavoured to deprive A. of all his rights, as well those under the will as by the adoption, the consent did not bind A., since it was given on the basis of a family arrangement, from which the father afterwards departed. *Ib.*, *Semble*, that if the consent were given by A. in ignorance of his rights, it would not be binding on him. *Ib.*

Cancellation.—Adoption cannot be annulled for any purpose whatsoever, which would not justify a disinheritance. There is no express text declaring illegal a renunciation of adoption; but at the same time there is not any which can be construed as approaching to a justification of it, *Sir W. H. Macn. Prins. of H. L.* 64, see 1 *Morl. Dig.* p. 24. In this respect it differs from adoption as practised by the Greeks, see *ante*, p. 35.

Although under no circumstances can an adoption be revoked or cancelled, yet in case of death, loss of caste, or the like, another may be adopted.

Limitation.—In a suit to set aside an adoption of a son, the period of limitation is not to be reckoned from the date of the adoption, if the members of the family who seek to set it aside have not known of it; it should be reckoned from the time when there was distinct knowledge of the adoption, *Sooburnomonee Dabea* v. *Petumber-Dobey*, 1 *Beng. H. C. R.* 221.

As against an adopted son suing for his share of the ancestral estate, the law of limitations does not begin to run until the allotment of such share has been demanded and refused, *Ayyávu Muppanar* v. *Niladatchi Ammal*, 1 *Mad. H. C. R.* 45.

Whether one member of a family can inherit property of one taken out of that family.—A member of the adopter's natural family cannot inherit the property acquired by the adopter in consequence of his adoption. The severance of an adopted son from his natural family is so complete that no mutual rights as to succession to property can arise between them, *Rayan Krishnamachariyar* v. *Kuppanayyangar*, 1 *Mad. H. C. R.* 180.

The Pundits, relying on the meaning of *Srí Ráma Pandita*, asserted that the right of succession did exist.* But the court, after

* See *Menu*, ix. 142; *Datt. Miman.* vi. 6, 7; *Datt. Chand.* ii. 18, 19; *Sutherland on Adoption*, p. 229; *Mitacshara*, chap. 1, sec. xi. § 32; 3 *Colb. Dig.* 147, 148; *Vyavahara Mayukha*, chap. 4, sec. v. § 21, 23; *Crastnarao's Case*, *Perry's Or. Ca.* 156.

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examining the basis of their opinion, and other law authorities, were satisfied that the gift made of one for adoption created an entire and irrevocable severance of him from his natural family, and said we are of opinion that the above decision is founded upon a just appreciation of the principles of an adoption, whereby the son of one man ceases to be such in the eye of the law, and he becomes the son of another man, inheriting thenceforth in his adoptive family, and having no more rights in his own family. If it would be a violation of that principle to allow a person adopted to return to his natural family, and take up their rights, it would be a greater violation thereof to introduce to the rights in the adoptive family the natural kindred of the adopted person, who assuredly never had any part or title in the adoptive family, or in their possessions. We observe, furthermore, that in the *Mitacshara*, the great authority in this Presidency on the law of inheritance, no place has been given in the natural family for the introduction into the line of heirs of one taken out of that family by adoption, and none in the adoptive family for the admission of them in the natural family.

ADOPTION BY WIDOW.—Upon adoption taking place by the widow, the child becomes heir of the deceased husband, and the widow's title to his estate merges into that of the guardian of the child, 2 *Stra. H. L.* p. 127; *Dhurm Das Panday* v. *Mussumat Shama Soondri Dibiah*, 3 *Moore's In. Ap.* 229; *Rungama* v. *Atchama*, 4 *Moore's In. Ap.* 1.

A childless Hindoo by deed directed a widow to adopt a son; after his death the widow brought a suit for partition, and the possession of her husband's share in the joint undivided estate. Pending the suit, she adopted a son. By the Hindoo law the act of adoption divested the property from the widow, and vested it in the adopted son, subject to the maintenance of the widow. Notwithstanding the adoption, the suit was prosecuted in the widow's name, and a decree made directing her to be put into possession. Held that under the circumstances she prosecuted the suit as the guardian of the adopted son, and was put into possession as his trustee, and was accountable to him for the profits of the property so decreed to her.

Lord Campbell, in *Dhurm Das Panday* v. *Mussumat Shama Soondri*, *supra*, in delivering the judgment of the lords of the Judicial Committee, said the widow of a childless husband succeeds as his heir, and his property real and personal vests in her. But if in the exercise of a power conferred upon her husband, she adopts a son, the property is divested from her, and vested in her adopted son. Now upon the authorities there seems to be no doubt that this is the result of an act of adoption, because the property is in the widow from the death of her husband, till the power of adoption is exercised. Then that adoption divests it from the widow and vests it in the adopted son.

SALE OF PROPERTY BY WIDOW PREVIOUS TO ADOPTION.—The

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question whether a retrospective right could be claimed by a son, after he had been adopted, so as to bar a sale made by his adoptive mother previous to his adoption, to the injury of rights at that time contingent and eventual, but which actually accrued to him upon his adoption, was raised in *Ranee Kishanamee* v. *Rajah Oodwaut Singh*, 3 *Sud. Dew. Adaw.* p. 228. There the son, when adopted, became the undoubted heir, and it was of course the correct doctrine that no sale made by a widow who possesses only a very restricted life interest in the estate, could have been good against any ultimate heir, whether an adopted son, or otherwise, unless made under circumstances of strict necessity. Besides, by the terms of the will of her deceased husband, the widow was only the appointed manager of the estate, the right of property vested in the son, subsequently appointed from the time of the rajah's death, and the widow had no authority but that of intermediate management under her husband's will.

ADOPTION BY WIDOW UNDER POWER—DEATH OF ADOPTED SON—WIDOW HIS HEIR.—A childless Hindoo, a member of a divided family in Bengal, by an Unomuttee Potta, authorised a widow to adopt a son for him after his death, and by that instrument made her his heir. His widow exercised the power, and adopted a son who died during his minority. Held that the widow was entitled to a life estate in her husband's property after the death of the adopted son, either under the deed, or as heir of the adopted son, *Soondur Koomaree Debbea* v. *Gudadhur Pershad Tewarree, et é contra*, 7 *Moore's In. Ap.* 54.

EFFECT OF KRITRIMA FORM OF ADOPTION.—The Kritrima son, as usually affiliated in the Mithila country, would indeed take the estate both of his own and of his adoptive father. He continues a member of his natural father, and is not considered as prolonging the line of his adopter, *Sutherl. Synop.* 228; *Macn. Prins. H. L.* 76.

The person adopted in this form by the widow does not thereby become the adopted son of the husband even though he sanctioned the adoption, 1 *Macn. Prins. H. L.* 76, and the express consent of the person nominated for the adoption must be obtained during the lifetime of the adopting party, *ib.* The relation of Kritrima son extends to the contracting parties only, and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father. He does not inherit collaterally, being ninth in the enumeration according to Yajnavalchya, *ib.* In Mithila the husband and wife may adopt each a Kritrima son, *ib.* 101. The sanction of the husband is not necessary in this form, and the son appointed by the woman will perform her obsequies, and succeed to her peculiar property though not to that of the husband, *ib.* 100, 101; 1 *Morl. Dig.* p. 21, see the Crita form of adoption referred to in 2 *Stra. H. L.* 107, and *Macn. Prins. H. L.* 101. In

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Mithila there is no limit as to age, and no condition as to performance of ceremonies. A man may adopt his own brother, or even his own father, and he and his issue remain members of his natural family, and he inherits in both, 1 *Macn. Prins. H. L.* 76.

NEED NOT BE IN WRITING.—Adoption need not be in writing any more than authority to a widow to adopt, 1 *Stra. H. L.* 93, see *post* p. 59.

INTENTION.—Mere intention to adopt is as insufficient as a mere agreement to do so. There must be actual adoption, gift, and acceptance, manifested by some overt act, *Menu,* ch. 9, § 168; 1 *Stra. H. L.* 95.

SECTION VII.

MODE OF ADOPTION.

Absence of ceremonies does not make adoption invalid—Kritrima.

ABSENCE OF CEREMONIES DOES NOT MAKE ADOPTION INVALID.—The ceremonies, both religious and civil, were formerly numerous, and many *directions* have been given advising the proper mode, but nothing more, such as sacrifices, the invitation of relatives, &c., but the absence of these does not make the adoption invalid, *Sutherl. Synop.* p. 218, and n. 13, p. 228; 3 *Dig.* 244; 1 *Stra. H. L.* 95; 2 *ib.* 87. Amongst the three higher classes the only essential ceremony is *Datta-homam* or sacrifice by fire. Mr Ellis considers that in Southern India this ceremony is confined to Brahmins, 2 *Stra. H. L.* 89; 1 *ib.* 96; and in Bengal also, 3 *Dig.* 149; *Rajah of Nobkissen* referred to, 1 *Stra. H. L.* 96; *Rajah of Tanjore,* 1 *Mad.* N. of Cas. 1827, No. 75. All classes require a common assent of both parties with reference to the purpose of adoption. The prescribed forms are enumerated in *Datt. Miman.* sec. 5; *Datt. Chand.* sec. 2; *Vasishta,* 3 *Dig.* 242, 262; 1 *Stra. H. L.* 94; 2 *ib.* 218; *Synop.* 228. In 2 *Knapps P. C.* 290, the Privy Council ruled that neither *any* religious ceremony nor any written acknowledgments were essential to the validity of an adoption, however advisable their presence may be.

Whatever benefit the Hindoos may think, in a spiritual point of view, they derive from the observance of these ceremonies, for civil purposes they can have no efficacy; all that a court of law would be bound to inquire into is, whether there was a giving and receiving by proper parties of a proper child, the prescribed forms not being essential. Not as *Sir T. Strange, H. L.* 97, says, that an unlawful adoption is to be maintained, but that a lawful one actually made is not to be set aside for any informality that may have attended its solemnization, 1 *Stra. H. L.* 97; 2 *ib.* 126, 130, 178, *Coleb.*

KRITRIMA.—The adoption of a Kritrima son is valid, without

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the performance of any particular form or solemnities, *Synop. H. L. B. Stokes*, p. 667.

This form of adoption is prevalent in the Mithila country, and is rarely practised in other parts of India, *ib.* 676, see 1 *Macn. Prins. H. L.* 76, 100, 101.

MALABAR.—On failure of the sister's progeny, male and female, the head of the family may make adoption. The descent being in the female line, the adoption must be of a female. In view of the probable minority of her offspring at the period when the management may fall in, a male, her brother, may be taken in adoption at the same time with herself, in order to afford provision for the administration of the affairs of the family, and for the conduct of the religious rites to be observed therein, *Stra. Man. H. L.* § 403.

In concluding the subject of adoption, we would observe, that a question may arise, whether a boy given and received in adoption may not, after he attains majority, should he find that he has been prejudiced in his interests, disclaim the adoption, and insist on the rights he possesses by birth in the property of his natural family. If a wealthy man were to give one of his sons to a man not so wealthy as himself, would the son be bound by the act? We are not aware that the question has ever yet been raised, though we can readily imagine cases, not only the instances elected, but in others in which it may arise. Bearing in mind the rights acquired by birth, and the circumstance, that a son is not a dependant on his father, but becomes, the moment he is born, a partner and sharer in the paternal property, he may be seriously prejudiced by removal from his paternal family, and by renunciation of his claims on their property as a necessary attendant on adoption. Since adoption occurs at an age when the son himself can have no voice in the matter, we do not think justice will be done if the son be not permitted to examine the power of election after he attains the years of discretion. It is true, the Hindoo Law does not provide for the possibility of such an objection being raised by the boy himself. It confines its doctrines on the subject to the religious element, and, with respect to inheritance, is based on the assumption that the transfer from one family to another is for the son's advantage. Where such is the case, the son can have no interest in the adoption; but when such is not the case, are the courts of India bound by the absence of authority in the Hindoo Law books to allow a minor to be prejudiced in his temporal interest by the act of his guardians? Would it not be more in accordance with justice to treat a case of that nature on the principles which regulate transactions in relation to guardian and ward?

In such a case as this, the courts might apply the rule introduced by Justinian of allowing the adopted son to inherit in both families his ancestral property, see *ante*, p. 20.

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CHAPTER III.

MINORITY.

Benares and Mithila Schools—Bengal school—Regulation period—Father proper guardian—Mother—Elder brother—Paternal relatives—Maternal kindred—Ruling power—Females—Assets make heir liable pro tanto*—Grounds of the liability of the heir discussed—Mr Mayne's observations on the patriarchal system—If manager contract debt not within scope of his authority his own undivided share is liable—General rule laid down by Coleb. refers to divided families—Necessity for obligation—Debts by Bengalee widow—Minors may now be sued by their guardians—Suits instituted in favour of and against minors—Share of minor in joint property—Acts of a minor in regard to property—Tutelage of women.*

BENARES AND MITHILA SCHOOLS.—In the Benares and Mithila schools minority lasts until the completion of sixteen years, 2 *Stra. H. L.* 76, 77, *Coleb.;* 1 *Macn. Prins. H. L.* 103; *Menu,* ch. viii. § 27; 1 *Morl. Dig.* p. 302, § 1, with respect to females as well as males *Stra. Man.* § 124. In the Bengal school the end of fifteen years is the limit of minority, *Macn. Prins. H. L.* 102; *Mr Colebrooke,* 2 *Stra. H. L.* 76, remarks that, *Rughunandana,* the great authority of Bengal, says—"One who has not arrived at years of discretion is one whose age is less than sixteen years." *Sir Thomas Strange,* vol. i. p. 72, says—"Belonging to any one of the three superior classes the youth ceases to be in ward upon ending his studentship and returning from his preceptor; if a Soodra, upon his completing his sixteenth year. A Hindoo father may postpone his son's majority by will beyond sixteen years, 1 *Fulton,* 393; *Morl. Dig,* p. 302, § 2.

REGULATION PERIOD.—Minority is extended to the eighteenth year, with respect to minors under the guardianship of the Court of Wards, *Bengal Regulation* 26, sec. 2, 1793; *Madras Regulation* 5, sec. 4, 1804.

FATHER PROPER GUARDIAN.—When the father is alive he is the legal guardian of his children.

MOTHER.—If the father be dead, or incompetent from idiotcy, the mother may assume the guardianship, *Macn. Prins. H. L.* 103; *Stra. Man.* § 128; and in Bombay this has been held to include the stepmother whose right of guardianship is declared to be superior

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to that of the minor's paternal uncle, 2 *Bomb. Rep.* 144; 1 *Macn. Prins. H. L.* 103, n.

Strange, 1 *H. L.* 71, says, the king is the universal superintendent of those who cannot take care of themselves, and in this capacity it rests with him, *i.e.*, the judicial power exercising for him this branch of his prerogative, to select for the office the fittest amongst the infant's relations, preferring always the paternal male kindred to a maternal ancestor or female, citing *Menu*, ch. viii. § 27; 3 *Dig.* 542; 2 *Stra. H. L.* pp. 73, 74, 75, *C.* It is stated that in practice the mother is the guardian, 3 *Dig.* 544. But *Sir Thomas Strange*, vol. i. p. 72, adds, as a Hindoo widow is herself liable to the same sort of tutelage, it is more correct to regard her as proper, if capable, to be consulted on the appointment of one. 1 *Macn. Prins. H. L.* 103, says, where the duties of manager and guardian are united, the mother is, in the exercise of the former capacity, necessarily subject to the control of her husband's relations, and with respect to the minor's person likewise. There are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternal kindred.

ELDER BROTHER.—In default of the mother the elder brother of a minor is competent to assume the guardianship of him.

PATERNAL RELATIONS.—In default of an elder brother the paternal relations generally are entitled to hold the office of guardian, 1 *Macn. Prins. H. L.* 104.

MATERNAL KINDRED.—Failing them the office devolves upon the maternal kinsmen, according to their degree of proximity, 1 *Stra. Man.* § 126.

RULING POWER.—But the appointment of guardians universally rests with the ruling power, 1 *Stra. H. L.* 72, who, whether natural or legal guardians be living or dead, is recognised to be the legitimate or supreme guardian of the property of all minors, whether male or female, 1 *Macn. Prins. H. L.* 104; *Menu*, ch. viii. § 27. Thus property of a woman and the goods of a minor falling into the king's power should not be taken by him as owner. . . . But it may be here remarked that the property of a minor should be intrusted to heirs and the rest, appointed with his concurrence; or if the infant be absolutely incapable of discretion, with the consent of a near and unimpeachable friend, such as his mother and the rest, 1 *Macn. Prins. H. L.* 104, note.

Persons authorised by law to make such appointment may, by will, appoint guardians to minors succeeding to landed property, liable to the jurisdiction of the Court of Wards, sec. xviii. Reg. v. of 1802, and cl. 5, sec. xix. In the event of no guardian having been appointed by will, the collector may recommend a person to be appointed. The next and legal heir or person having a direct or indirect advantage in the death, or continued incapacity of the minor, are ineligible, cls. 2 and 3, sec. xix. Females can only be appointed guardians to female minors. Act ix. of 1861 of the

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Legislative Council of India empowers the Mofussil courts to dispose of claims to the guardianship of minors, but does not interfere with the powers of the Court of Wards, nor with the powers of the late Supreme Courts of India exercised under the English law.

FEMALES.—The guardianship of a female, whether she be a minor or adult, rests with her father until she is married. In his default, with her nearest paternal relations, 1 *Macn. Prins. H. L.* 104 ; 2 *Stra. H. L.* 22, 204.

When married the woman becomes a member of her husband's family, and is under their control, her husband being her natural guardian. In his default, his sons, grandsons, and great-grandsons. In their default, the husband's heirs generally, or those who will inherit his property after her death. In default of them, her paternal relations. In their failure, her maternal kindred, 1 *Macn. Prins. H. L.* 104 ; so that the dependence of women is strictly maintained.

ASSETS MAKE HEIR LIABLE PRO TANTO.—1 *Macn. Prins. H. L.* 105, discusses the question of the power of the guardian over the property of his ward, and says,—" As I understand the provisions on the subject, minors are, under the protection of the law, favoured in all things which are for their benefit, and not prejudiced by anything to their disadvantage." " It has been laid down by Sir W. Jones, that assets may be followed in the hands of any representative, *Coleb. On Obligations and Contracts*, chap. 10, § 585. Admitting the rule, he denies that latitude which has been given to it, and adds,—" It has been held, I believe, for this purpose, a guardian may be considered as the representative of the deceased ; whereas, it is obvious that, *quoad hoc*, he is only the representative of his successor." I understand the expression to mean, that whoever takes the assets, whether near or remote in the order of inheritance, is liable for the debts of the deceased, so far as these assets go, provided such heir have attained his majority, and that, when the heir is a minor, the creditor must wait until the minority expires before he can recover his debt out of the assets. Subject to this condition the son must pay his father's debts as well as all necessary debts contracted on his account during his minority ; and, according to the Benares school, the debts of the father are binding upon the son whether the former left property or not, as well as those of the grandfather, but he need not pay interest on the latter.

If there are no assets the obligation is only a moral, not a legal one. *Mr Colebrooke* in his *Obligations and Contracts*, chap. 2, § 51, lays it down as a principle, that heirs succeed to the obligations of ancestors without any reference to the adequacy of the property, and the rights of inheritance must be relinquished when its obligations are repudiated, 1 *Macn. Prins. H. L.* 106, note.

THE GROUNDS OF THE LIABILITY OF THE HEIR DISCUSSED.—European writers on Hindoo law appear to consider that sons succeed to the estates of their fathers in the same manner as

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they do according to English law. This is not exactly the case. In our opinion, the Hindoo law regards sons and fathers living in association as possessing a *quasi* joint tenancy in property. On the death of the father, or of his son, without male issue, the share of the deceased goes to increase the shares of the survivors. If the son leave issue, his undivided and unascertained share descends to such issue. But before the death of either father or son the whole family lived in union as partners, jointly managing the common property for the common weal, and jointly incurring obligations for the mutual benefit of the several members. After the death of one member of the undivided family, his male issue continue to live with the grandfather, their uncles, and male cousins, if any, in the same condition. The managing parcener, be he father or son, has the control of the property, and may contract obligations; yet as he acts by the authority conferred upon him tacitly, or expressly, by the other members of the family, we feel justified in considering that his acts in relation to the property are the acts of the joint family. A debt contracted for a necessary purpose by the father must necessarily be a charge not only on the property, but also on the partners jointly and severally; consequently, when his son, or sons, succeed their father in the management of the property, they do not succeed to his obligation to discharge the debts contracted in his own name for the joint benefit. Such debts were contracted by him as their agent, as well on their account, as on his, and the obligation to discharge them existed and was binding on them previous to their father's death. We can therefore understand why the Hindoo law laid down the doctrine which, to European intelligence seems so unreasonable, that the heir is bound, using the word heir, as understood in English law, whether he succeeds to assets or not.*

MR MAYNE'S OBSERVATIONS ON THE PATRIARCHAL SYSTEM.—The *Hon. H. S. Mayne*, in his work on *Ancient Law*, pp. 183–185, in reference to the patriarchal system generally, observes:—"It is in the peculiarities of an undeveloped society that we seize the first trace of an universal succession contrasted with the organisation of a modern state; the commonwealth of primitive times may be fairly described as consisting of a number of little despotic governments, each perfectly distinct from the rest, each absolutely controlled by the prerogative of a single monarch. But, though the patriarch, for we must not yet call him the paterfamilias, had

* The presumption of Hindoo law is, that a debt incurred by the head of a Hindoo family residing together is under ordinary circumstances a family debt; but when one of the members is a minor, the creditor seeking to enforce his claim against the family property must show that the debt was contracted *bonâ fide* for the benefit of the family, *Tandavaraya Mudali Valliammal*, 1 *Mad. H. C. R.* 398; vide also *Hunoomanpersaud Panday*, v. *Must. Babooee Munraj Koonweree*, 6 *Moore's In. Ap.* 393.

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rights thus extensive, it is impossible to doubt that he lay under an equal amplitude of obligations. If he governed the family, it was for its behoof. If he was lord of its possessions, he held them as trustee for his children and kindred. He had no privilege or position distinct from that conferred on him by his relation to the petty commonwealth which he governed. The family, in fact, was a corporation, and he was its representative, or, we might almost say, its public officer. He enjoyed rights, and stood under duties; but the rights and the duties were, in the contemplation of his fellow-citizens, and in the eye of the law, quite as much those of the collective body as his own. Let us consider for a moment the effect that would be produced by the death of such a representative. In the eye of the law, in the view of the civil magistrate, the demise of the domestic authority would be a perfectly immaterial event. The person representing the collective body of the family, and primarily responsible to municipal jurisdiction, would bear a different name, and that would be all; the rights and obligations which attached to the deceased head of the house would attach without breach of continuity to his successor; for, in point of fact, they would be the rights and obligations of the family, and the family had the distinctive characteristics of a corporation. Creditors would have the same remedies against the new chieftain as against the old, for the liability, being that of the still existing family, would be absolutely unchanged. All rights available to the family would be as available after the demise of the headship as before it, except that the corporation would be obliged—if, indeed, language so precise and technical can be properly used of those early times,—would be obliged to sue under a slightly modified name." This is a correct description of the condition of an undivided Hindoo family.

IF MANAGER CONTRACT DEBT NOT WITHIN SCOPE OF HIS AUTHORITY HIS OWN UNDIVIDED SHARE IS LIABLE.—If the manager, however, contract a debt not within the scope of his authority as the agent of the family to contract, that is a debt not for a necessary purpose, or for the common weal. So far from that debt being obligatory on his parceners, his own undivided and unascertained share of the estate alone would be liable; see *Palanivelappa Kaundan* v. *Mannaru Naikan*, 2 *Mad. H. C. R.* 416; *Stra. Man.* § 186–188; and if that share were insufficient, the creditor could not, it would seem, come upon the other shares for reimbursement.

GENERAL RULE LAID DOWN BY COLEB. REFERS TO DIVIDED FAMILIES.—The general rule laid down by *Coleb.* at p. 25 of his *Treatise on Obligations*, is applicable in cases other than of an associated family; for instance, if after division a son should succeed by inheritance to his father's estate, or a brother to a brother's, a nephew to an uncle's; here no joint liability having been contracted with the deceased, it would be unjust to hold the heir responsible if the liabilities exceed the value of the assets. So in

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case of a wife or daughter succeeding to a husband or father, no joint liability with him having been contracted, they ought not to be held liable beyond the assets.

NECESSITY FOR OBLIGATION—DEBTS BY BENGALEE WIDOW.—A. Zemindar of Bengal executed a deed of sale for a portion of his estate to B., who executed a separate instrument of redemption on repayment of principal and interest within a year. Before that time A. died, leaving a widow who adopted a son by authority after his death. Within a few days of the completion of the year, when the sale would have become absolute and irrevocable, the widow as guardian of the minor borrowed money of C., with which she paid the debt of B., and freed the land, executing a second sale of the land redeemable within a given term, which expired without repayment.

The first question raised was, Could any rule of Hindoo law prevent the land from becoming the property of B on the term of the first sale expiring without repayment?

2d, If there be no such rule, and the widow saved the land for a time by the second conditional sale, was it not a case of necessity, justifying her act as clearly beneficial to her ward?

3d, If a father sell a portion of his land with a condition for redemption, and his heir (a minor) or his guardian on his part do not redeem, is not such land gone irrevocably?

4th, Do the debts of the father become payable out of his assets, even in the hands of his heir who is a minor, on demand from the guardian?

The Hindoo law officers replied that the necessity for the sale had not been made out, inasmuch as the estate of the deceased could not have been legally alienable for his ancestor's debts until after the minor had attained his majority. Judgment was given for the purchaser on the following grounds:—That supposing the ancestor's conditional sale to have remained unredeemed after the expiration of the stipulated period and the usual term of notice, the land would of necessity have fallen to the creditor; that it was mere folly to urge that the act of the mother in saving it for a time, and obtaining a further period, was not to be held good as an act beneficial for the minor, inasmuch as but for her renewal by a fresh loan in her capacity of guardian the conditional sale must undoubtedly have become absolute to the creditor; that no plea of minority could be listened to, or any other doctrine recognised than that the estate of a Hindoo of Bengal becomes liable at his death for the satisfaction of his just debts, especially where he has pledged his land as security for these debts, and that his power of selling, outright or conditionally, any part of, or all his landed property, could not be questioned. That any other doctrine would involve in confusion the acts of the court for many years past, as there was scarcely a contract of conditional sale in the provinces, where that form of contract prevails, in which some

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of the co-sharers were not minors when the sale became absolute, and that if their minority in such cases must be considered a bar to foreclosure, and cause the transaction to run on for fifteen years longer, there would probably be an end to such transactions altogether, and it would not be possible to raise money at all, or at least not except on harder terms than at present; that the doctrine maintained by the court appeared to be supported by *Jagannatha*, vol. i. chap. 5, 172, by *Colebrooke*, and that though there should prove to be conflicting opinions as to the law, the established usage and practice ought to prevail. In short, whatever might be the real doctrine of the Hindoo law on the subject, the court was bound to follow that law in matters of inheritance, marriage, caste, and religious usages only, and not in matters of contract, of which nature the case in question appeared to be, 1 *Macn. Prins. H. L.* 106.

In answer to the above arguments, it was observed that, supposing the minor's estate not to be liable, there did not exist any necessity for the widow's making a conditional sale. It may be assumed, too, that, according to our own regulations, a mortgage would not be foreclosed against a minor, and that he would be allowed his equity of redemption on coming of age. It did not, therefore, signify whether the term of the mortgage was near expiring or not. It was at the lender's own risk to take a mortgage in which the borrower's interest might expire before the end of the term. I shall not, however, enter into any question as to the expediency or otherwise of the doctrine established in this instance, but content myself with a brief inquiry as to the law of the case, which appears quite clear when disencumbered of the authority of *Jagannatha*, whose authority cannot be held to be oracular or incontrovertible in any instance, especially where it is opposed to texts of unquestioned weight and indubitable import. The first text at all to the point is that of *Yajnavalchya*, 191. It has thus been translated by *Mr Colebrooke*, with a view to adapt it to the subsequent commentary of *Jagannatha*. "He who has received the estate of a proprietor, leaving no son *capable of business*, must pay the debts *of the estate*, or on failure of him, the person who takes the wife of the deceased, but not the son whose father's assets are held by another." Now here it must be observed that the words in *italics* are not in the original, and that the expression "capable of business" is clearly an interpolation of the commentator. The original is *rickthagrahee*, or taker of the property. In the concluding part of the text it is distinctly stated that the son whose father's assets are held by another must not pay the debts. The next text is that of *Narada*, (172,) which, agreeably to *Jagannatha's* comment, has been thus translated by *Mr Colebrooke*, "Of the successor to the estate, the guardian of the widow and the son, *not competent to the management of the affairs*, he who takes the assets becomes liable for the debts. The son, *though*

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incompetent, must pay the *debts* if there be no guardian of the widow, nor a successor of the estate, and the person who took the widow, if there be no successor to the estate nor competent son." Here the original does not mean a son incompetent, from minority, to manage his affairs, but a son incompetent to inherit by reason of some natural disqualification, such as blindness, disease, or the like. A son, even though incompetent to inherit in the same manner as the son who does not inherit assets, is morally bound to pay his father's debts, and the object of the above text is to show the obligation under which he lies if there be no successor to the estate, nor guardian of the widow. There is nothing whatever in any text that I have been able to discover relative to the payment of debts by a guardian. Lastly, come the two texts of *Katyayana* and *Narada*, (187 and 188.) "On the death of a father, *his debts* shall in no case be paid by his sons incapable from nonage of conducting their own affairs, but at their full age of *fifteen years* they shall pay it in proportion to their shares, otherwise they shall dwell hereafter in a region of horror." Even though he be independent, a son incapable from nonage of conducting his affairs is not *immediately* liable for debts. It will be observed that *Jagannatha*, in commenting on these passages, attempts to make a distinction between minority and infancy, and infers that it is only during the latter state that a son is exempted from liability for his father's debts, but the text in the original is *apraptavyavahara*, which clearly means one who has attained the age prescribed for the management of affairs. It follows that when, owing to a son's minority the father's assets are taken in charge by another person, such person cannot legally apply any portion of the assets in the payment of the father's debts, and that it is only when a person succeeds to property in his own right that he is at liberty to pay the debts of the ancestor by means of such property. A guardian may, indeed, dispose of a portion to meet a necessity arising for the minor's subsistence. But no necessity can by possibility arise for disposing of any portion to pay the minor's father's debts, for he must cease to be a minor before he can be liable. Nor does there appear to be much hardship in this rule. The provisions of the English law savour of much more hardship; for, according to it, real estates are not subject at all to the payment of debts by simple contract, unless made so by will.* All immovable property, by the Hindoo law, is subject to a kind of entail, so much so, that the right of the son is equal to that of the father, supposing the property to be ancestral, and it would be hard enough, under such circumstances, that the imprudence of the father should ruin the son; for, as it is, he is bound, both legally and morally, to pay the debts; and it may be, perhaps, but just that the period for exacting payment should be

* The law on this subject has been changed, 3 and 4 W. IV., c. 104.

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postponed until he comes to years of discretion sufficient to enable him to realise the means of satisfying the creditors with the least detriment to himself. The assets cannot in the meantime be alienated by the minor, and the creditor is ultimately sure, where assets exist, of receiving the amount of his demand, with interest, especially in a case of mortgage, where the produce of the property or usufruct might be awarded to the creditor in lieu of interest, which arrangement could not operate prejudicially to either party, or involve any breach of the Hindoo law; for the usufruct of property is one species of legal interest, which is called *bhogalabha*, or interest by enjoyment. The pundits being called upon to expound the law in a case involving a similar question, 1 *Bomb. R.* 176, decided that a woman who had succeeded, as heir-at-law, to property left by her own father, cannot dispose of that property in liquidation of the debts of her husband, unless her son, having already attained the age of sixteen years, or age of discretion, shall consent to the act. This, it will be observed, is a stronger case than the one alluded to, because a son is bound to pay the debts of his father, whether he inherit assets or not; and by this decision it was determined that property to which he had a claim in expectancy only could not be alienated for that purpose until he attained the age of majority; and it was ruled in a case decided under the Madras Presidency that the father being dead, his son is not liable for his debts until after he has attained the age of seventeen, 1 *Macn. Prins. H. L.* 112.

Minors may now be sued by their guardians.—How far this may have been the law at the time *Macnaghten* wrote, it certainly would not be acted upon now. There is scarcely an instance in which a guardian does not exist against whom a suit can be brought.

Suits instituted in favour of and against minors.—With regard to suits instituted in favour of or against minors, there is much obsolete law in the books; but as this subject is regulated at present by the practice of the existing courts, we have not considered it necessary to trouble the reader with that which can only be interesting to the antiquarian.

Share of minor in joint property.—The guardian of a minor may sue on his behalf for allotment to him of his share in family property provided there may have been malversation of the estate to the prejudice of the minor's interests, but not otherwise, *R. A.* 49 of 1850, *Sudder Court*, *Alimelammal* v. *Arunachellam, Pillai*, 3 *Mad. H. C. R.* 69; *Kamakshi Ammal* v. *Chidambara Reddi*, 3 *Mad. H. C. R.* 94.

The acts of a minor in regard to property are not valid, *Stra. Man.* § 130; *Morl. Dig.* p. 302, § 3.

No act in regard to the property or liability of a minor is valid but such as may be clearly one of necessity, or for the benefit of the minor, *Koollooka Bhat. on Menu*, viii. 27; *Stra. Man.* § 131.

Tutelage of women.—Women are considered unfit for inde-

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pendence. There is an exception to this rule in certain of the labouring classes, as washer-women, cow-keepers, toddy-drawers, musicians, oilmongers, &c.; the woman who contributes to the maintenance of the family may contract obligations if for the uses of the family, and render their husbands liable for the same, *Stra. Man.* § 135, *Virasvami Chetti* v. *Appasvami Chetti*, 1 *Mad. H. C. R.* 375. *Sir A. Bittlestane* says—By the law of England in the case of husband and wife living together, the presumption is that the wife is the husband's agent for contracting debts for the necessities of the family; and, according to Hindoo law also, a wife has authority to bind her husband by contracting for necessaries, in proportion as the management of the family is confided to her. By Hindoo law, perhaps, the presumption of authority is not so strong as it is by English law. In a note upon the same case the learned reporter, observes *Katyayana*, says, debts incurred for domestic uses by the slave, wife, mother, or disciple, or one gone to a far country, or deceased, and also by a son, and also by his son, must be paid: so says *Bhigu*, and *Yajnavalchya* holds a woman shall not pay debts incurred by husband or son, neither a father those of his son; nor a husband those of his wife, unless contracted for the benefit of the family, *Vyavara Magukha*, chap. 5, sec. iv. § 20, and see *per Devala*, cited *ib.* chap. 4, sec. x. § 11; 1 *Coleb. Dig.* 303.

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CHAPTER IV.

PROPERTY.

Land was the earliest subject of acquisition—Modes of acquisition—Property is fourfold—Creation of right of inheritance—Absence for twelve years—Ancestral and self-acquired property.

LAND WAS THE EARLIEST SUBJECT OF ACQUISITION.—It would be a work of supererogation, and to a certain extent irrelevant, and therefore profitless to attempt a lengthened inquiry here into the origin of the right of property according to Hindoo notions, or the nature of the tenures of real property in India. In all countries, whether civilised or otherwise, the earliest subject of property was land, which still forms, at all events, wherever civilisation has extended, the most important subject of acquisition. This is particularly so with regard to India, which being for the most part a vast continent, shut out from maritime intercourse except on the seaboard, the people were in a manner compelled to engage in agricultural rather than commercial and manufacturing pursuits, except so far as their own absolute exigencies required. It is property of a character chiefly looked to for the maintenance of families, and to which in different provinces, and under successive despotisms, they are recorded to have clung to the last, so long as the exactions of power left to them anything (wherever they did leave anything) that could be called a proprietor's share, 1 *Stra. H. L.* 14. The *Saraswati Vilasa* for the first time in India declared the will of the prince paramount to the right of the subject, and the claim on the part of the ruling power to the absolute property in the soil, on which the modern revenue system of that country is founded is there advanced, *Pref. to* 1 *Stra. H. L.* xvii. Till lately the prevailing opinion was, that the right to the soil was in the sovereign, an opinion that has been elaborately combated in an incidental chapter of a history of deserved celebrity, *Historical Sketches of the South of India, by Wilks*, chap. 5; 1 *Stra. H. L.* 13, and note 2.

Sir Thos. Strange (*ib.*) adds, In the Bengal provinces, where the Mahommedans by the time that the English began to supersede them, had long ruled with unlimited and unrelenting sway, the right of the Hindoo in land was no longer to be traced, and he had degenerated into a mere cultivator, liable to have his share of the produce continually reduced and varied; the right of cultiva-

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tion alone being descendable: the property in the soil vesting in the sovereign, leaving in the people only an annual defeasible interest, (1 *Dig.* 460,) subject to constant diminution at the will of the ruling power. This doctrine, maintained by the Mahommedan government was, upon our acquisition of India, long acted on by us, until its consequences in checking improvement became perceptible, when Lord Cornwallis so far restored the subject's right as to fix professedly for ever, payable in money, the proportion to which the state should be entitled, leaving to the possessor of the land after this deduction the benefit of progressive improvement, with unrestrained power of alienation, to be regulated only by the native law. *Sir Thos. Strange*, in describing the benefits anticipated to arise out of Lord Cornwallis's permanent settlement, has overlooked the fact that that settlement was made with the zemindars, and not with the cultivators of the land. It is the reproach of the permanent settlement introduced into Bengal and Madras, that the ryots or cultivators were handed over to the mercy of the zemindars. It is true the zemindars were restrained by certain legislative provisions from exacting more than the rate payable at the time of the permanent settlement, *Mad. Reg.* 30, of 1802, but this provision, and the corresponding provisions of the Bengal Code, were so obscurely worded, that in many instances it is to be feared little opportunity was afforded to the ryot to benefit by "progressive improvement." The proprietary right is clearly laid down by *Menu*, chap. ix. § 52, 53:—"Cultivated land is the property of him who cut away the wood, or who cleared and tilled it;" *Sir Thos. Strange*, 1 *H. L.* 15, adds, of the produce which the ordinary proportion accruing to the sovereign was a sixth, and in times of urgent distress a fourth. Besides this, when land was allotted from the corporate stock, parts of the produce of each proprietor was and continues to this day to be distributable to the officers and artisans—to the twelve *ayvangadees* (as they are called) ministering justice, preserving peace, managing the concerns, and supplying the wants, or contributing to the convenience of every town or village, of the aggregate of which, (well described as it has been as a mass of little republics,) India is constituted.

PROPERTY IS FOURFOLD.—Property, according to Hindoo law, is of four descriptions—viz., real, personal, ancestral, and self-acquired, 1 *Macn. Prins. H. L.* 1. The more correct expression in the original law books is movable and immovable; the former includes anything personal, the latter, lands and buildings; amongst these Hindoo law writers class slaves and corrodies—that is, assignments on lands, *Jim. Vahana*, ch. ii. § 9, 13, 14, 25; 3 *Dig.* 34; 1 *Macn. Prins. H. L.* 1; 1 *Stra. H. L.* 16. Property is either ancestral or self-acquired, and with regard to its possession it is either joint or separate. But although, like ours, the Hindoo law divided property into real and personal, yet it does not descend in the same way. With us real property descends to the heir, whilst personal

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property goes to the executors or administrators for distribution under the will, or under the statute of distributions; but amongst the Hindoos they both descend alike to the same persons, and are subject to the same incumbrances. See "Charges on Property."

Modes of acquisition.—The various modes of acquisition, as occupancy, birth, gift, purchase, &c., have been detailed and discussed with all the *minutia*, elaborateness, and subtlety peculiar to Hindoo jurists, in their various legal works, and not being considered appropriate to a purely practical work like the present, further reference to them is deemed profitless and inappropriate.

Creation of right of inheritance.—Our inquiries here will be directed mainly to the nature of that property, the right to which is created by birth. To sonship must be traced all the impediments existing on alienation, a man without heirs having an absolute and uncontrolled dominion over his property by whatever means acquired, 1 *Macn. Prins. H. L.* 2. That learned author observes, that an indefeasible inchoate right is created by birth, seems to be universally admitted, though much argumentative discussion has been used to establish that this alone is not sufficient to create proprietary right. The most appropriate conclusion appears to be that the inchoate right arising from birth, and the relinquishment by the occupant, (whether effected by death or otherwise,) conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle, *i.e.*, by the death of the owner, (natural or civil, or his voluntary abandonment,) *Sri Crishna*, cited 2 *Dig.* 517; *Macn. Prins. H. L.* 2. *Sir Thomas Strange*, vol. 1, p. 17, says, according to the doctrine of the *Mitacshara*, as prevalent in the Peninsula and North India, the sons of a man are considered as having with their father by birth so far a coordinate concern in that part of it which is ancestral, that if he thinks proper to come to a partition of it in his time, he must divide as directed by law, *i.e.*, give them and himself equal shares, nor is it in his power to alienate any considerable portion of it without their concurrence. It is, according to this school, so far as regards the interest of parceners, inalienable. The Bengal school follows the same rule with respect to partition, admitting to the father otherwise an unreserved power of alienation over all that he possesses, however in particular instances its exercise may be liable to censure.

Absence for twelve years.—The absence of the ancestor for a period exceeding twelve years constitutes a legal title to the succession on the part of the heirs, his death after that period being presumed, 3 *S. D. A. R.* 28, (25th April 1820.) Some authorities, however, maintain that the period varies with reference to the age of the missing person, 1 *Macn. Prins. H. L.* 2 note.

Ancestral and self-acquired property.—Another division of property recognised in Hindoo law is into ancestral and self-acquired.

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Ancestral or inherited property is that which, as its name imports, is derived from ancestors, or which has descended from father to son, and includes whatever is obtained through its instrumentality, as by accumulations or exchange, &c. It may be either real or personal. In ancestral real property the right is always limited, and the sons, grandsons, and great-grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of inheritance, (see Disqualifications for Inheritance,) are declared to possess an interest in such property equal to that of the occupant himself, so much so that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another, 1 *Macn. Prins. H. L.* 2 ; 3 *Dig.* 45. If any property lost by the ancestor be recovered by the heir, it is no longer considered as ancestral, but classes as self-acquired, unless, indeed, it has been recovered by the use of the patrimony. See *post*, Inheritance—Partition, 1 *Stra. H. L.* 16, 217.

Self-acquired property may be obtained by gift, purchase, or by adverse and undisturbed possession. An indefeasible title is acquired after three generations—that is, after ninety years, if the possession has been adverse and undisturbed, that is, against the will of the proprietor ; for, if he hold under an agreement with the proprietor, it is not adverse. So the possession is not adverse if the holding be under his sapinda, his daughter's husband, a priest, or the sovereign.

Joint-property—Is that species of estate which is known as family property, or enjoyed in common by an undivided family, and includes ancestral property.

Self-acquired property—Is what a person enjoys independently of any co-sharer, and is acquired by his own personal exertions without any assistance from the joint-estate, by gift, by superior skill in intellectual pursuits, the professions, arts, or sciences.

Stridhana.—With regard to woman's property, see *post ;* and with regard to the power of alienation, see title, Alienation.

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CHAPTER V.

CHARGES ON PROPERTY.

Section I.

The estate descends charged with encumbrances—Payment of debts—Order of payment—Priority amongst classes—Where a creditor has taken a pledge for his debt—Capital contributing to gains—Creditor may follow assets—Liability during father's life—Liability of widow—Of managing members—Power of manager to charge ancestral estate is limited—Debt incurred by the head of the family—Minors—Debts incurred by a slave wife, &c.—Liability for wife's debts for necessaries—Debts contracted by wife living apart—Liability of family property—Contracted by brother for support of family—But in trade consent necessary—Diminution of share on account of profuse expenditure—If debt exceed surplus—Separate acquisitions liable—Liability of widow's heirs.

The estate descends charged with encumbrances.—According to Hindoo law, the estate descends to the heir charged with certain encumbrances. *Sir Thomas Strange* says, these are of three kinds:—

1. Debts and other obligations in the nature of legacies.
2. Certain specific duties to be provided for out of the estate where it has descended to a single heir, and out of the common fund where it has vested by survivorship in undivided co-heirs as marriage.
3. Maintenance of all requiring and entitled to it.

Mr Strange, § 181, says,—The charges on the estate are the just debts; the obsequial monthly, half yearly, and yearly ceremonies of ancestors; initiatory ceremonies terminating in the upanayana, marriages, and maintenance.

Payment of the debts.—The primary obligation on the heir is the payment of the debts of the ancestor. Formerly a son was bound to pay his father's debts whether he had assets or not; but this was a moral rather than a civil obligation, and could be evaded by a relinquishment of the paternal estate, 2 *Stra. H. L.* 275 *C.* As this obligation was not civilly binding on the heir, our courts, considering it inequitable to enforce it, have held that the liability extends only to the amount of assets descending to the heirs, *Sudr. Court in S. A.* 12 of 1851. The reason assigned for

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the debts following the assets is a religious one, "for the peace of the father's soul." This is unsatisfactory, but it is as good as most reasons given for a rule of law, see *Blackstone, passim*, who certainly has detracted very much from the value of his work by the reasons he has given for the law which he has enunciated. We have, in our opinion, given the true reason at pp. 65–67.

ORDER OF PAYMENT.—The father's debt must be first paid, and next, a debt contracted by the man himself; but the debt of the paternal grandfather must even be paid before either of these, *Vrishaspati* 1 *Dig.* 265.

The sons must pay the debt of their father when proved as if it were their own; *or with interest*, the son's son must pay the debt of his grandfather, and his son, or the great-grandson, shall not be *ante*, pp. 65–67, Minority. First the debt of the grandfather should be discharged; next the debt of the father; and, lastly, the debt contracted by the man himself, with interest. But the debt of a grandfather may be paid without interest, and the great-grandson shall not be compelled against his will to discharge the debt of his great-grandfather; but if the great-grandson be willing, it may be discharged by him, 1 *Dig.* 266. Debts being a charge upon property, all of which are not barred by the statute of limitation ought to be paid by the successors to the property.

PRIORITY AMONGST CLASSES.—With regard to the priority amongst classes, the old law has become obsolete, it is now mere matter of procedure which is governed by the practice of the courts.

WHERE CREDITOR HAS TAKEN A PLEDGE FOR HIS DEBT.—The creditor who has received a pledge to be used shall not receive a share of the dividend, for he trusted to the chattel possessed by him for the recovery of his debt. But he may demand a sale of the pledge, and he is not bound to share it with the other creditors, 1 *Dig.* 179. Those debts which are due at the time of distribution shall receive a dividend. The subject is further discussed in 1 *Dig.* 379.

CAPITAL CONTRIBUTING TO GAINS.—*Katyayana* suggests an exception to those rules, viz., that capital on which it is proved that the assets were gained, and no other debt, must be repaid by the debtor out of these assets, 1 *Dig.* 380, so that a debtor would have *a lien* upon the assets produced by his particular loan, out of which he is entitled to be paid in preference to any other creditor, 1 *Stra. H. L.* 168. *Jagannatha*, 1 *Dig.* 380, says,—If there be at once many creditors of the sacerdotal and other classes, he through whose loan the assets were gained must be paid out of these assets, not any other creditor; should a surplus remain, it shall be paid to the other creditors by a dividend, or in the order of classes. For example, borrowing a sum from one man, and therewith paying the revenue which is due to the king by the custom of the country, or supporting his own dependents and the like—the debtor conducts agriculture, the produce of that culture is appli-

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cable to the payment of the debt due to that creditor alone, *ib.* 380.

CREDITOR MAY FOLLOW ASSETS.—The assets of the debtor may be pursued by a creditor into whosoever hands they may come, *Yajnavalchya*, 1 *Dig.* 270; 1 *Stra. H. L.* 166, 2 *ib.* 280, 282, as property descends on the death, whether natural, presumed, or civil, so the liability then arises, *Vishnu*, 1 *Dig.* 266; 1 *Stra. H. L.* 166.

LIABILITY DURING FATHER'S LIFE.—During his father's life his son is not liable for his debts, they being payable from the family property, if incurred for the benefit of the family, or from his own share, if purely personal. But after death the son is liable for *all* the debts, to the amount of the assets, if he once receive them, even though they are then lost, stolen, or destroyed. But probably equity would interfere if the loss was through no fault of his own. But *vide*, pp. 65–67.

LIABILITY OF WIDOW.—The widow is not liable for her husband's debts, unless she possess assets of the debtor. The debts must be paid, whether enough remain for her maintenance or not, 2 *Stra. H. L.* 280, 281, *C.* and *E.* The principle is applicable in the case of all other surviving relatives, *Stra. Man.* § 185. If a wife possessing separate property render it by special agreement liable for a debt contracted by her husband, she must, in his default, pay it, or if she have possessed herself of her husband's property, she is liable to that extent for his debts. A widow is liable in these two cases only. The Sastrie (Pundit) considers the claim of the widow to subsistence from the husband's estate as preferable to the claim of his creditors; and as he is confessedly one of the most respectable of those whose names are found in these papers, the presumption is that he is right, though for this part of his opinion I know not whence he derives his authority, *ib. Ellis.* It is doubtful, however, whether the Pundits' opinion would now be considered worthy of the respect paid to it by Mr Ellis.

LIABILITY OF MANAGING MEMBERS.—Where property is held in common, the managing member is answerable for all claims on the family, 2 *Stra. H. L.* 334, *Ellis; Stra. Man.* sec. 186. Of course he should be answerable jointly with the other members. No family debt affects self-acquired property, except perhaps to the extent of the acquirer's own share, in the event of the joint-property being insufficient to satisfy the debt. A junior member may bind his own share of the property, but only to the extent of that share.

THE POWER OF MANAGER TO CHARGE ANCESTRAL ESTATE BY LOAN. ETC., IS LIMITED.—The power of a manager for an infant heir to charge ancestral estate by loan or mortgage is, by the Hindoo law, a limited or qualified power, which can only be exercised rightly by the manager in a case of need, or for the benefit of the estate. But where the charge is one that a prudent owner would make,

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in order to benefit the estate, a *bonâ fide* lender is not affected by the precedent management of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred, in the particular instance, are the *criteria* to be regarded. If that danger arises from any misconduct to which the lender has been a party, he cannot take advantage of his own wrong to support a charge in his favour against the heir, grounded on a necessity which his own wrong has helped to produce. The lender, however, in such circumstances is bound to inquire into the necessity for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he inquire, and act honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of the charge which renders him bound to see to the application of the money.

A *bonâ fide* creditor who has been deceived, but who has acted honestly, and with due caution, is not to suffer. The mere creation of a charge by a manager of an infant's estate, securing a proper debt, is not to be viewed as an improper act.

No general rule can be laid down upon whom the *onus* lies as to the allegation and proof of *bonâ fides* of a manager, whose title to alienate is qualified in contracting debts and resorting to loans. The presumption proper to be made varies with the circumstances, and is regarded by and dependent upon them. The mortgagee, however, in enforcing his security against the heir, must allege and prove the facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing the loan.

A mortgage bond to secure a sum of money lent to a party deceased, in substitution of a previous deed, executed by a former proprietor, by way of further security for a sum advanced by the mortgagee to the widow of the deceased, charging part of the ancestral estate described, the widow, as having a beneficial proprietary right in the mortgaged estates, although in fact she was only the curator of her son, a minor, the heir of the deceased—held that the description, though inaccurate, was not such an assumption of ownership as was derogative to the rights of the heir, but was to be viewed as an act done by her, as director, in behalf of the heir; and as the mortgage was beneficial to the estate, it was binding upon the heir, *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*, 6 *Moore's In. Ap.* 393.

DEBT INCURRED BY HEAD OF FAMILY—MINORS.—A debt incurred by the head of a Hindoo family residing together is, under ordinary circumstances, presumed to be a family debt. But where one of the members is a minor, the creditor seeking to enforce his claim against the family property must show that the debt was contracted *bonâ fide*, and for the benefit of the family, *Hunoomanper-*

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saud Panday v. *Mussumat Babooee Munraj Koonweree*, 6 *Moore's In. Ap.* 393; *Tandavaraya Mudali* v. *Valli Ammal*, 1 *Mad. H. C. R.* 398.

In the latter case the suit was brought to recover certain lands, the property of an undivided Hindoo family, which had been mortgaged to the plaintiff by the first defendant, who was the elder brother of the second defendant, and the managing member of the family at the date of the mortgage; the second defendant was a minor. The plaintiff offered no evidence to show that the mortgage debt had been contracted for the benefit of the family. The district munsiff was of opinion that in the absence of proof that the money was borrowed for family purposes, the family property belonging to the two undivided brothers, the first and second defendants could not legally be held liable for the plaintiff's bond, and dismissed the suit. This decision was reversed upon appeal by the civil judge, on the ground that the debt which was incurred by the first defendant, the elder brother and head of the family, must be presumed to be a family debt, for which the second defendant and the family property must be held liable. The appellant, the second defendant, contended that the burden of proof, that the debt was contracted for the benefit of the family, lay on the plaintiff, and cited the first-mentioned case.

The High Court:—We see no reason to question the doctrine laid down by the civil judge as regards a family of brothers or other coparceners resident together under ordinary circumstances; but in the present instance we observe that the civil judge has omitted to notice an important feature in the case, that the only coparcener of the first defendant, whose rights are affected by the act of the latter, was a minor at the time of the execution of the mortgage, and unable to protect his own interests; we consider that on the principle enunciated in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*, *supra*, it was incumbent on the plaintiff to adduce some proof that the debt was contracted *bona fide*, and for the benefit of the family.

A Hindoo testator by his will empowered his executor and guardian of his infant children, who was also manager of his zemindary, to charge the same for payment of debts and advances during his children's minority, and directed that when the children came of age they should repay the amount raised. The executor borrowed of a banking firm money for payment of government revenue, and gave bonds charging the zemindary with the sums so borrowed. On the children coming of age, they executed a *kistbandey*, or instalment bond, for repayment of the amount then due. This instrument they afterwards repudiated, and on a suit being brought against them by the lender, upon the *kistbandey*, they in defence not only denied the existence of the bond, but alleged fraudulent collusion between the lender and executor, in obtaining the loan and granting a lease to the nominee

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of the lender at an inadequate rent. Held that the executor had power under the will to charge the zemindary with advances made for the purposes of the zemindary, *Golaub Koonwurree Bebee* v. *Eshan Chunder Chowdhooree*, 8 *Moore's In. Ap.* 447.

DEBTS INCURRED FOR DOMESTIC USE BY A SLAVE, WIFE, ETC.—*Katyayana* says, " Debts incurred for domestic uses by the slave, *wife*, mother, or disciple of one gone to a far country, or deceased, and also by his son, must be paid, so says *Bhrgu*, and *Yajnavalckya* holds a woman shall not pay debts incurred by her husband or son, nor a father those of his son, nor a husband those of his wife, unless contracted for the benefit of the family," *Mayukha*, chap. v. sec. iv. § 20; 1 *Dig.* 303; *Coleb. Oblig.* 28, 29.

LIABILITY FOR WIFE'S DEBTS FOR NECESSARIES.—By Hindoo law a wife has authority to bind her husband, by contracting for necessaries in proportion as the management of the family is confided to her. By Hindoo law, perhaps, the presumption of authority is not so strong as it is by the English law, per *Bittlestone, J.*, in *Virasvami Chetti* v. *Appasvami Chetti*, 1 *Mad. H. C. R.* 375.

DEBTS CONTRACTED BY WIFE LIVING APART FROM HER HUSBAND.—If it were permitted by the Hindoo law for a husband to supersede his first wife by taking another to live with him, and this was her sole reason for refusing to live with him, his doing so would not, according to Hindoo law, justify his first wife in separating herself and remaining apart from him of her own free will, and could not without more, give her implied authority as his agent to bind him for debts incurred for necessaries, per *Scotland, C.-J. ib.* 375.

LIABILITY OF FAMILY PROPERTY.—The family property is not liable for the debt of an individual member, *Stra. Man.* § 187, not even if by his death the family property is augmented.

The debtor's share in the property will, however, be liable, *S. A.* 113 and 114 of 1855, *Stra. Man.* § 188. The creditor would have to sue to have the share set out by partition, in order to make it thus available to him. Allowance would first have to be made out of the share for the share of the debtor's male issue, the residue only being available to meet the debt, *Stra. Man.* § 188.

DEBTS CONTRACTED BY BROTHER FOR SUPPORT OF FAMILY.—A debt contracted by one brother living in family partnership for the support of the family, is binding upon all in every case.

BUT IN TRADE CONSENT NECESSARY.—But consent, express or implied, is requisite in the case of one contracted in the course of trade or for charitable purposes. Supposing the elder brother to be manager for the family, this might exonerate the person of the younger one,* but not the property, see 1 *Dig.* clxxx., clxxxiii.

A Hindoo possessed of landed and other property died leaving

* Whether the person of the younger brother would be exempted or not would depend on the existing procedure of the Court.

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two sons, the younger a minor. The elder took possession and borrowed money, (exceeding his share of the property,) for which he gave his note, mortgaging for the payment of it the family property. The younger son was not privy to the contracting of the debt, nor had he ever recognised its validity, so far as his interest was concerned, not did it appear that it was incurred on account of the family. The question raised was, Is the debt chargeable on the family property beyond the share of the elder brother? *Mr Colebrooke* remarks :—On the subject of the question which you had lately before you, I entirely agree with you that a mortgage, sale, or gift by one of several joint-owners without the consent of the others is invalid for others' shares. In Bengal law it is clear that it is good for his own share, and for that only. In other provinces it is as clear that the act is invalid, as it concerns others' shares, and the only doubt which the subtlety of Hindoo reasoning might raise, would be whether it would be maintainable even for his own share of undivided property. On the other two points, as stated by you, the law is undoubtedly as you have viewed it. On the third point I take the law to be, that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property beyond the share of the actual alienor, and that an unauthorised alienation by one of the sharers is invalid beyond the alienor's share as against the alienee. But consent is implied, and may be presumed in many cases, and under a variety of circumstances, especially where the management of the joint property intrusted to the part owner who disposes of it implies a power of disposal; or where he was the only ostensible or avowed owner, or generally when the acts or even the silence of the other sharers had given him a credit, and the alienee had not notice. . . . I rather consider it to be a point of evidence what shall suffice to raise the presumption of consent or acquiesence, 2 *Stra. H. L.*, (*vide Peddamuthulaty* v. *N. Timma Reddy*, 2 *Mad. H. C. R.* 270) than a matter on which the Hindoo law has pronounced specifically, and I do not recollect any passages more express than those to which you have referred, showing that the alienation is invalid against the alienee. The case of *Prannath* v. *Calispunker*, *Beng. S. D. A. Rep. ante* 1805, pp. 49, 51, to which you refer, was, I conceive, determined on the ground of implied consent, the land being answerable for the revenue for which the managing owner had engaged on the part of himself and sharers, besides other peculiar circumstances in the case."

DIMINUTION OF SHARE ON ACCOUNT OF PROFUSE EXPENDITURE—IF DEBT EXCEED SURPLUS—SEPARATE ACQUISITIONS LIABLE.—A coheir who may have been guilty of profuse expenditure, or who may have dissipated the property by unauthorised alienations, is to have his share diminished by the amount wasted or alienated by him, but should this exceed the value of his share, the surplus is not to be made a debt against him (1 *Stra. H. L.* 224, 225), for the

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other heirs should have checked his guilty waste in time, and must suffer for their neglect. This might be done by a Court declaring his acts null, or compelling a division, or removing him from the management. His separate acquisitions would, however, be liable, *Stra. M. H. L.* § 272.

LIABILITY OF WIDOWS' HEIRS.—When property passes to a widow, those succeeding to her are not liable for debts contracted by her, unless they are of such a nature as would have warranted her alienating the property to discharge them, 7 *S. D. A.* 114 *Judgt. of S. D. A. in Ap.* 179 of 1846, such as payment of husband's debts, Government Kist, debts, &c. Hers is only a life interest interposed between her husband and successor, who is not so much her heir as her husband's.

SECTION II.

The debt must have been for a good consideration—Debts due for fines or tolls—Suretyship—Nuptial debts—Borrowed for use of family —Where no assets—The course of payment of debts on partition —Performance of obsequies—Expenses of initiation and marriage —Escheated property—Persons under disability—Daughters.

In actions against the heir three things are to be considered:— 1. The debt must have been for a good consideration, otherwise it will not bind. 2. It must not have been a ready-money transaction, as a toll or fine; if it is, the heir is not liable. 3. The debt, when incurred for ceremonies, marriage, &c., in order to make it binding on the son, must have been reasonable in amount.

1st, IT MUST HAVE BEEN FOR A GOOD CONSIDERATION—so that if the consideration for the debt be gaming, or the purchase of spirituous liquors, or debauchery, or other improper objects, the son is not liable, 2 *Bomb. R.* 200, 203, n.; 1 *Stra. H. L.* 167; II. *ib.* 456; unless at those festivals where gaming and drinking are authorised, 1 *Dig.* 304, 307, 312; or where the use of spirituous liquors is allowed by custom, *ib.*; so, a debt due for a cause repugnant to good morals, *Vyasa*, 1 *Dig.* 307.

DEBTS DUE FOR FINES OR TOLLS.—A fine due to the king for some offence is not a debt for which the son is liable.* So, a debt due for a toll, *i.e*, a duty of custom payable at a wharf, or the like, 1 *Dig.* 304-307. *Sir Thomas Strange* says, 1 vol. 167, The reason of which may be that they are to be regarded as ready-money payments, for which credit will have been given at the risk of him by whom they ought to have been received.

SURETYSHIP.—So debts originating in suretyship, commerce, and

* The Indian Criminal Procedure Code (1860) empowers magistrates to levy fines.

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the rest, shall not involve the sons, they shall not be paid by the sons of the debtor, *Gautama*, 1 *Dig*. 305.

NUPTIAL DEBTS.—Where the debt attaches upon the common property, as for instance, where it has been incurred for the nuptials of any of the family, the expenses attending the ceremony must have been reasonable, according to the usage and means of the family. If the expenses have been extravagant or excessive, the member incurring them will alone be liable unless the family has adopted them.

BORROWED FOR USE OF FAMILY.—If the money borrowed was expended for the use of the family it must be paid by that family, divided or undivided, out of their own estate, *Menu*, ch. viii. § 166; 2 *Stra. H. L.* 275, 276; contracted fairly for the use of the family by any member, whether uncle, brother, son, wife, servant, pupil, or dependants, it binds the whole, 1 *Dig*. 293-299; 1 *Stra. H. L.* 167; 2 *ib*. 458; *Beng. R.* 12 for 1817, p. 607.

WHERE NO ASSETS.—It seems settled at Bengal that the obligation of the son to pay the debts of the ancestor has no legal force independent of assets, without which a son and grandson are under a moral and religious, not a civil obligation to pay the debt, but assets may be followed in the hands of any representative, 1 *Dig*. 266, note by *Sir W. Jones*; 1 *Stra. H. L.* 167; 2 *ib*. 275. *Sir Thomas Strange*, 1 vol. 167, says, To the southward the doctrine of the *Mitacshara*, supported by *Madhavya* and *Chandrika*, is said to render the payment of the father's debts with interest, and the grandfather's without interest, independent of assets, a legal as well as a sacred obligation, 1 *Stra. H. L.* 167, see *ante*, p. 77.

THE COURSE OF PAYMENT OF DEBTS ON PARTITION.—This subject has been discussed under the title "Partition."

Sir Thomas Strange, 1 vol., 169, says, Modified as the details of Hindoo law are everywhere by local usage and practice, how far the whole of the ancient provisions for the payment of debts are at present applicable must be left to the discretion of the courts exercising jurisdiction within particular limits.

FRIENDLY GIFTS.—*Sir Thomas Strange*, 1 *H. L.* 169, says, Connected with the duty of paying the debts of ancestors, is the discharge of obligations resting on the intention of the deceased sufficiently manifested: since, though nothing occurs in the Hindoo law expressly in favour of the testamentary power as exercised under other codes, it provides distinctly for the performance of promises by the ancestor in his lifetime to take effect after his death, and to this extent a friendly gift as it is called, not being an *idle* one, far less one founded on an *immoral* consideration, being available in law as a charge upon heirs, may be assimilated to a legacy.

In support of this he refers to the following cases, vol. ii., p. 426, viz.:—A man having fostered and maintained a boy not his son, on his deathbed directed half of his estate to be given to his son, a quarter part to his brother-in-law, and a quarter part to him

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whom he had so bred up. The gift was not in writing, but was proved by two witnesses.

The Pundit replied, "If one having maintained another for a long time, should be inclined to give him and his brother-in-law a moiety of his property, giving the other moiety to his son, he should do it in the presence of his relations and of some of the people of the village where the land, if any, lies. Should his death be too sudden to admit of their attending, provided he had declared his intent and poured water into his hands in the presence of his wife and son, and of the people about him, it should be equivalent to its being committed to writing, and though even this formality should not be observed, it would be good in law for money though not in regard to land." Upon this, *Mr Colebrooke* remarks, This is gift in contemplation of death, subject to the general rules regarding gift, see *Mitac.* ch. i. s. i., § 31 as to the form, *Mr Ellis* remarks, The whole formality must be completed with regard to land, and possession must be given, or the act is invalid. But what has such a conveyance to do with a will? With the consent of his sons and wife, and the knowledge of his nearest of kin, a man may make a distribution of his property according to the rules laid down by the law in such cases; and such distribution will be good, whether made on his deathbed or at any other time, and whether confirmed by writing or not, *ib.* 435.*

Sir Thomas Strange, 1 *H. L.* 169, adds, But according to the doctrine of the *Mitacshara*, such a gift referring to property held in common, in order to be good must have had the consent of the deceased co-parceners," *Mitac.* ch. i. s. i., § 30; as if made by a widow, it must have had that of her guardian and next heirs, 2 *ib.* 445. What was promised shall be received by the descendants of the donee down to the fourth in descent, if not vested; if vested in the donee it is partible amongst the co-heirs if he have any, 3 *Dig.* 38; see 1 *Stra. H. L.* 170.

2d, Performance of obsequies.—Of property which descends by inheritance, half should be carefully set apart for the benefit of the deceased owner, to defray the charges of his monthly, six monthly, and annual obsequies, on the ground that wealth is useful for alms and enjoyment, *Vrihaspati, Apastamba, Jim. Vahana*, ch. xi. s. vi., § 13.

Expenses of initiation and marriage.—The expenses incurred for the initiation of the uninitiated and for the marriage of the unmarried members of the family are also charges upon the estate. *Yainavalchya*, 2, 125, says, Uninitiated brothers should be initiated by those for whom the ceremonies have been already completed. Upon which the *Mitac.* ch. i. s. vii., § 4, has the following exposition, By the brethren who make a partition after the decease of their father the uninitiated brothers should be initiated at the ex-

* Query, Whether those gifts can be made only of movable property? It would seem that they require the doctrine of constructive possession to support them.

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pense of the whole estate. *Yajnavalchya*, 2, 125, says, Unmarried sisters should be disposed of in marriage, giving them a quarter of a share, *Mitac.* ch. i. s. vii., § 5, *et seq.* But the *Chandrika* and *Madhavya* countenance the opinion that the specified allotment intends only a sufficiency for the charges of the sister's nuptials, 2 *Stra. H. L.* 313, C. 289, *C. and E.*

Initiation involves a succession of religious rites attended with more or less expense, commencing with purification and terminating in marriage. They are ten in number, of which marriage is the only one competent to females and Soodras; the rest being confined to males of the three superior classes, *Mitac.* ch. i. s. vii., § n. 3; *Dat. Miman.* s. iv., § 23, n.; 3 *Dig.* 101.

We have seen, *supra*, that the duty of initiation attaches to those who themselves have been initiated, and the provision for it is like that for the payment of debts to be made before partition out of the common stock, 1 *Stra. H. L.* 170; and as we have before seen the expenses must be reasonable, *ante*, p. 85.

This obligation does not extend beyond brothers and sisters, consequently not to collaterals, such as nephews, 2 *Stra. H. L.* 286. In *Mitac.* ch. i. s. iv., § 19, s. v., § 2, s. vii., § 4, no mention is made of nephews, 2 *Stra. H. L.* 287; *Coleb.*

Escheated property.—An estate taken by escheat is subject to the same trusts and charges, if any, previously affecting the estate, *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, 8 *Moore's In. Ap.* 500.

When the crown takes by escheat for want of heirs, it has the same power to impeach an unauthorised alienation by the widow, which the heirs of the widow, (had there been any,) would have had, *ib.* 529.

The question was raised in *Bawani Sankara Pandit* v. *Ambabay Ammal*, 1 *Mad. H. C. R.* 363, whether if the right to maintenance had existed in a son whose adoption was held to be invalid, that right would as an estate descend to his sons natural or adopted, but was not decided, and under the view taken by the Court in respect of the right of a person whose adoption is not valid, it is not likely to arise again.

Persons under disability.—We have already said in chapter vi. that all those who are excluded from the inheritance for the reasons there referred to, are entitled to maintenance, *Mitac.* ch. ii. s. x., § 5, except the out-caste and his issue subsequently born, *Jim. Vahana*, ch. v. § 11, 12; *Menu*, ix. § 201; 1 *Stra. H. L.* 67, 174. With regard to the out-caste, the *Mitac.* ch. ii. s. x., § 1, says, he must be maintained, citing *Yajnavalchya*, 2, 141; whilst *Jim. Vahana*, ch. v., § 11, 12, citing *Devala* and *Baudhayana*, excludes the out-caste, and the latter, his issue also. *Menu*, however, does not except them, ch. ix. 202. *Sir Thomas Strange*, arguing by analogy, says, Admitting the right of the out-caste to food and raiment, it must be difficult to exclude the adulterer's widow.

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Daughters.—The daughters of persons labouring under disability must be maintained until married, and the expenses of their nuptials defrayed, *Yajnavalchya*, 2, 142; *Mitac.* ch. ii. s. x., § 12, 13; and their childless widows must be supported for life, *Jim. Vahana*, ch. v., § 19; *Mitac.* ch. ii. s. x., § 14.

Section III.

Maintenance—How estimated—Widow and only son—Where one of united brothers dies leaving a widow and a son—A mother's right as between herself and her sons—There is no distinction in the different tribes—Half-brothers and childless widow—The rights of a brother's widow having a son—Rights of father's wives on partition among the brothers—How maintenance is to be provided for—Residence—Rate of maintenance—Want of chastity—Desertion of husband by his wife—Implied agency—Polygamy—Widow's right to recover arrears of maintenance—When husband's property proves deficient—Grandmother—Stepmothers—Sisters—Daughter—Illegitimate children of the Khatri case.

Maintenance.—The maintenance of dependent members of the family is also a charge upon the common fund. The widow, where she does not take as heir is the first who is entitled to maintenance, and her maintenance is the first charge upon the estate, after payment of the debts.

How estimated.—*Sir Thomas Strange*, p. 171, says, In awarding it to her, what she possesses as stridhana, or her peculiar property, is to be matter of account, the utmost that she can claim being to have it made up to her equal to what would be a son's share in the event of partition; and again, p. 172, an opinion that her maintenance should be independent of her peculiar property is unsupported; again, whether in estimating her stridhana on the occasion, her clothes, ornaments, and the like are to be taken into account, or only such articles of her property as are productive of income to her or conducive to her subsistence does not distinctly appear, though the restricting this account to the latter would seem to be reasonable, considering the object.

We cannot think that this is the correct view of the law. It is in right of her husband that she is entitled to maintenance, and her claim to it is irrespective of her stridhana. *Mr Ellis*, 2 *H. L.* 291, says, As long as the family continues undivided all the parceners, their wives, and families are entitled to a joint maintenance. On division, widows, wives, and children can claim only on the portion of their respective husbands and fathers. In the present case, if the son were alive at the time of division, his mother would have to look to him alone for maintenance; if he

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were dead, she would be entitled in right at once both of her husband and son to succeed to a full share of the estate, that is to say, a full share should be the *maximum* allowed her.

Mr Colebrooke, 2 *Stra. H. L.* 294, in remarking upon an opinion of a Pundit that the mother is entitled to as much only as will enable her to give rice with alms to poor strangers, and for food and raiment, says, "This opinion is conformable to the *Smriti Chandrika*, where it is affirmed on the authority of a passage of *Baudhayana*, (in which a text of the *Taittinyaca Veda* is cited declaring women incapable of inheritance,) that the mother shall not take a share as of heritage, but an allotment adequate to her wants, and not exceeding in the whole the amount of a son's share, including what she may possess as her peculiar property." But, he adds, "This opinion is, however, contravened in the *Madhavya*," (2 *H. L.* 297, *Ellis*,) a work of great authority in Southern India, and which seems in this instance entitled to a preference over the *Smriti Chandrika*.

And *Mr Ellis* remarks, "The widow's title is to maintenance, the ultimate measure of which is according to all the authorities a share." See 2 *Stra. H. L.* 295, but see *ib.* 297.

WHETHER STRIDHANA IS TO BE INCLUDED.—*Mr Colebrooke* remarks, in a case from the *Zillah of Nellore*, 2 *Stra. H. L.* 307, "This is taken from the *Mitacshara*, ch. 1. s. vii. § 2. The *Chandrika* explains that her allotment, including her separate property, must be made equal to a full share." But *Mr Ellis* remarks, "This opinion is generally correct, but I do not understand either the authority or the reason for restricting the maintenance to the amount of half a share in case of the existence of *stridhana*. The division (as it appears to me) *should be made without reference to any property she may hold under this title*, unless it may have been accepted by her with consent of the parties concerned in lieu of other claims; and in this case it is evident she is entitled to no further share in the event of division. The widow's claim to maintenance from her husband's estate is absolute, unlimited by circumstances; but then it is only a claim to maintenance, and it is not correct to say that she is entitled to any share or division. This makes no alteration in her right, it is still maintenance only to which she is entitled; but to this some legal measure must be assigned, and the correct opinion seems to be that it shall be the amount of a full share as received by the co-parceners, or perhaps this may be considered as its *maximum*. This is, of course, applicable only where there are male heirs, the widow succeeding by right to the property on failure of such, 2 *Stra. H. L.* 307.

WHERE PROPERTY UNPRODUCTIVE.—*Mr Ellis* says, If she have property of her own, not consisting merely of pearls, clothes, ornaments, and the like, but from which an income is derivable, in this case it is to be made up equal to a share without reference to any fanciful division of halves and quarters, of which the Pundits (mis-

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taking the explanatory language of the law, as "she shall otherwise receive a half or a quarter," for positive injunction) are so fond. I say above, "from which an income is derivable." I cannot just now refer to my authority for this, as I have not my books at hand; but it is the sense of the law. The law says she shall have a maintenance, but it is not required that either the family stock, or her own, shall be reduced to afford it. It is clearly meant that it shall be a maintenance by income; if, therefore, she have no property from which she can derive an income, without destroying the property, she is entitled to a full share, 2 *Stra. H. L.* 306.

WIDOW AND ONLY SON.—The father, being dead, leaving a widow and infant son with property, the son and estate being in the hands of the brother of the deceased, the widow demanded the custody of each. The Pundit was asked who was entitled to it, and whether the son was compellable to live with his mother, or may choose with whom to live? to which he replied, The estate is the son's, out of which the widow is only entitled to be maintained. The son is not compellable to live with his mother, it is rather her duty to live with him. Upon which *Mr Colebrooke* remarks, The sovereign is the guardian of minors, (3 *Dig.* 542.) The mother cannot claim a share, but a maintenance merely, from an only son, her right to a specific allotment arising only when a partition is made, *Zilla. of Chingleput*, 2 *Stra. H. L.* 290.

WHERE ONE OF UNITED BROTHERS DIES LEAVING A WIDOW AND A SON.—If there be undivided brothers, and one die, leaving a widow and son, they succeed to his share of the joint property, is the answer given by a Pundit to a case submitted to him; upon which *Mr Ellis* remarks, As long as the family continues undivided, all the parceners, their wives and families, are entitled to a joint maintenance. On division, widows, wives, and children can claim only on the partition of their respective husbands and fathers. In the present case, if the son were alive at the time of division, his mother would have to look to him alone for maintenance; if he were dead she would be entitled in right at once both of her husband and son to succeed to a full share of the estate—that is to say, a full share should be the *maximum* allowed her. If litigation take place, it is the measure to be adopted by the Court; not that the dividing parties are bound to give her so much, if they can prevail on her to take less, nor any share at all if they can provide among themselves for her maintenance. Such, at least, I believe to be the correct doctrine; whether her dominion over the property be limited or otherwise is another question, *Zillah of Nellore*, 2 *Stra. H. L.* 291.

A MOTHER'S RIGHT AS BETWEEN HERSELF AND HER SONS.—The husband of the appellant had died forty years before the commencement of the suit, having amassed in his lifetime and left an estate in ready money and jewels to the amount of about 5000 pagodas. Upon his death, she took possession of his property and delivered

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it over, as she alleged, to her four sons on their coming of age; of this there was no evidence, and her son, the defendant, denied it, and stated that 300 pagodas had been paid by his younger brother to his mother, and that the plaintiff, having the option, had refused to live in their house. The question was asked, What should the sons be deemed to give the mother, according to *Darma Sastra*?

Answer of the *Sastree* (*Slokum*, in Sanscrit) *Slokum of Yajnaval-chya, Slokum of Katyayana, Slokum of Vyasa.*

According to these, the mother shares equally with the sons, whether the division take place in the time of the father, or afterwards in that of the sons. *The mistake lies in qualifying her right to participate as a right to share.* (Another *Slokum*,) According to this she is entitled to as much only as will enable her to give rice with alms to poor strangers, and for her food and raiment. Thus the expression of an equal share with the sons *resolves itself into a particular portion of money in the division of the estate by the sons*, not that she takes an equal proportion with them. It is so held by *Jagannatha-turca-punchanana*, (the *Digest*,) which declares that the son is bound to provide his mother with maintenance only, and no more. In the present case, though the wealth of the defendant be considerable, he is bound to allow his mother for food and raiment only, and he is under no further obligation. *Mr Colebrooke* remarks—This opinion is conformable to the *Smriti Chandrika*, where it is affirmed, on the authority of a passage of *Baudhayana*, (in which a text of the *Taittinyaca Veda* is cited, declaring women incapable of inheritance,) that the mother shall not take a share as of heritage, but an allotment adequate to her wants, and not exceeding in the whole the amount of a son's share, including what she may possess as her peculiar property. This position is, however, contravened in the *Madhavya*, a work understood to be of great authority in the south of India, and which seems, in this instance, entitled to a preference over the *Smriti Chandrika*. The reference to *Jagannatha's Digest* does not seem to be correct. It is there maintained (see translation, vol. iii. p. 12, 30) that the mother may expect from her sons making a partition an equal share with them; and that it is only through maternal tenderness that this right is in the present times foregone, and *Mr Ellis* remarks, The mother's title is to maintenance, the ultimate measure of which is, according to all the authorities, a share, 2 *Stra. H. L.* 294, 295.

THERE IS NO DISTINCTION IN THE DIFFERENT TRIBES.—Two brothers of the *Chetriya* tribe, being about to divide, after his death, the estate of their father, the question is as to the rights of the mother, who claims to share with them. To what in this tribe is she entitled? The Pundits answer was, that the mother has by law no right to share with her sons. She is entitled to her *stridhana*, and if there be land yielding an annual produce, to as much of it as

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will suffice to be settled upon her for a maintenance. *Mr Colebrooke* remarks, The law provides, that when a partition takes place among brothers, the mother shall have an allotment made up to her, equal to a full share. There is no distinction in this respect amongst the different tribes, *Zilla. of Vizagapatam*, 2 *Stra. H. L.* 296.

HALF-BROTHERS AND CHILDLESS WIDOW.—In a question between a childless widow and the half-brothers (by the same father) of her deceased husband as to her rights, the Pundit replied, That she is entitled to demand of them as much as will provide her food and raiment with sufficient for the *shradum*, or annual ceremony of her husband; and *Mr Colebrooke* remarks, They are bound to maintain her, see *Narada cited Mitacshara*, ch. ii. s. 1, § 7. But *Mr Ellis* denies that this is the law of the *Smritis*. He says it is the convenient law of more modern commentators, endeavoured to be supported by proposing alterations in the original texts, for which there is no foundation. In recent times, however, when the operation of the Hindoo law had been interrupted, and none other established in its stead, the nefarious practice of the males of the family seizing all the property of it, and reducing the females to a state little short of slavery, came gradually to prevail, which practice, as appears throughout these papers, the present race of pundits are sufficiently inclined to support. The correct doctrine is, that a widow succeeds to the "entire share" (*christnam ansam* *) of her husband immediately, if partition have taken place; eventually, if it have not. What, then, is the situation of a widow of a co-parcener during the time the family continues undivided? Is she merely entitled to a maintenance? No; she is in the situation of her deceased husband, and is entitled to the use of the joint-property to the full extent that he was entitled to it, remembering always that as a female she is under the protection of her natural guardians, *Travengada Chary* v. *Ragoonada Chary*; 2 *Stra. H. L.* 297.

THE RIGHTS OF A BROTHER'S WIDOW HAVING A SON.—The plaintiff's husband and the defendants were brothers. The plaintiff had a son aged four years by her husband, and she instituted a suit for a share of the undivided property for herself, and another for her son; and the Pundit was asked his opinion as to her rights under the general law of inheritance and partition, she being, moreover, charged with adultery; † and he replied, "There is no ground for the claim of separate shares for herself and her son. The share that is given to the son must maintain his mother.

* *Christnam ansam*"—the entire share. This expression is read by some, *christnam artham*, the "entire estate;" and on this reading, it is maintained that the widow takes the estate of her deceased husband in the event only of previous partition. But this is confuted by the better jurists.

† She could not be charged with adultery after the husband's death.

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Though she should not conduct herself to the entire satisfaction of her caste people, still she must be supported out of the share allotted to her son, who, in the meantime, is to continue under her care till he attain his age. Nor though she should prove an adulteress, can he refuse to supply her with the necessaries of life." *Mr Colebrooke* remarks, The son is entitled to the share of his father, who was one of four brothers, *Mitac.* ch. i. s. v. § 2, and his mother must be maintained out of his allotment; but the sovereign, or a person selected by his authority, is the guardian of the widow. Brethren are not bound to maintain the unchaste widow of their childless brothers, *Mitac.* ch. ii. s. i. § 7. Nor has any authority been found for imposing it as a civil obligation on the son to maintain his mother if she be an adulteress, (query, unchaste;) and *Mr Ellis* says, correct as to the exclusive right and consequent obligation of the son, I do not think, however, and probably the Pundit does not intend, that the defendants could be compelled to a division of the estate until the majority of the child, *Vencummy* v. *Govindoo Chetty*, 2 *Stra. H. L.* 309.

RIGHTS OF FATHER'S WIVES ON PARTITION AMONG THE BROTHERS. —In cases of partition among the brethren, to each of the father's wives, who is a mother, must be assigned a share equal to that of a son, and to the childless wives a sufficient maintenance; but, according to the *Mitacshara* and other works current in Benares and the southern provinces, childless wives are also entitled to shares, the term *mata* being interpreted to signify both mother and step-mother. The *Smriti Chandrica* is the only authority which altogether excludes a mother from the right of participation, *Macn. Prins. H. L.* 50. A step-mother has no right of succession according to the law of Bengal, and the property of her step-son will rather go to her uncle's adopted son. If, after the death of R, the first widow of K, her adopted son N died without issue, his share goes to the adopted son of K's full brother—*i.e.*, to the cousin-german by adoption, not to the second widow of K, (step-mother by adoption,) nor to the heirs of the half-brothers of the adopting father. If, however, the adoption by the appellant (the second widow) of K be good, which was made on the death of N, then her adopted son is heir to N.* The reason why the appellant, the step-mother of N, cannot succeed to his share is, that in the *Daya Bahga* and other authorities current in Bengal, wherever the word *mata*, or mother, occurs, it is explained to intend *jananee*, or actual mother. These books do not authorise the step-mother's succession; but she receives a maintenance out of the estate. In the books of the *Dechun*—viz., the *Mitacshara*, &c. —the word *mata* implies both mother and step-mother; according

* In the *Shasters* there is no express prohibition, or sanction of two adoptions. If it be the usage in Bengal to make two adoptions, the adoption of R. is valid, and he succeeds, *ib.*

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to these, the step-mother would share, 2 *Macn. Prins. H. L.* 61; citing *Menu. Baudhayana, Gautama.*

HOW MAINTENANCE IS TO BE PROVIDED FOR.—There seems to be three modes of providing for the payment of the allowance. One is to estimate the value of the maintenance to be allowed, and to give the widow a sum; a second is, by assignment of land revertible to the estate after the death of the widow; in both these cases in proportion to the amount of the property of the husband, and to her support as well as those dependent upon her, including the performance of charities and the discharge of religious duties; a third, is to invest a sum at interest for the payment of the maintenance, or to deposit company's paper, 1 *Stra. H. L.* 171.

RESIDENCE.—In *Ex parte Janaky Ummah*, 2 *Stra.* 299, along with her maintenance, a house, valued at 300 pagodas, was assigned to the widow for a residence. In another case, *Gooruvammal* v. *Vidy. Jyen*, 2 *Stra. H. L.* 303, a portion of the family house towards the west was set apart, and assigned to her. Upon this case *Mr Colebrooke* remarks, The relationship between the appellant and defendant does not appear. It is to be presumed a brother, nephew, or cousin, with whom she lived as a member of an individual family, in which case the appellant's right to maintenance is conformably to the passage of *Narada* in the *Mitac.* ch. ii. s. 1, § 7.

THE RATE OF MAINTENANCE.—The following is an answer to an inquiry addressed to *Sir John Anstruther*, 2 *Stra. H. L.* p. 301:—

All agree that maintenance must bear some proportion to the amount of the property. The Brahmins, who are universally the directors of all women, and especially of the rich, when consulted, invariably represented a large allowance as necessary for the widow, and especially for religious purposes. Misled by them, the allowances were large. The people, however, represented that the state of widowhood by the Hindoo religion was, as it really is, a state of degradation and penance, with which large allowances were inconsistent; that they had the effect of throwing widows into the hands of designing men who enticed them from their families, from whom they lived apart, to the disgrace of both. That many of the supposed religious ceremonies were either performed by the family, and not by the widow, or if performed by her, were properly performed at a small expense. Finding these representations to be true, the allowance for maintenance has been much reduced, and is now low, although they still bear the same relation to the amount of the estate; but an evil of a very serious tendency has been entirely stopped. *Mr Blaquere's* opinion was, that "The amount allowed for the maintenance of a widow should be in proportion to her wants—that is, sufficient for her own support and that of those immediately dependent on her. The means of the estates must be considered, and the general circumstances of the particular estate the guide for settling the amount of the maintenance, there being no fixed rate or proportion laid down."

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Sir John Anstruther might have included another consideration—viz., the position and rank of the family.

WANT OF CHASTITY.—*Sir Thomas Strange*, 1 *H. L.* 172, says, "As chastity is a condition of her inheriting on failure of male issue, so it would seem that by a want of it she forfeits her right to maintenance, leaving it a question, however, in the case of the Hindoo, whether, notwithstanding, she be not entitled (as out-castes generally are) to food and raiment.

Mr Ellis, 2 *H. L.* 39, remarks, *Menu* nowhere says that a woman divorced is not entitled to a maintenance. She is to be "abandoned," deprived of nuptial rites; she is to be divested of her ornaments and separate property, but she must be maintained, as must an out-caste be, by his family.

Mr Colebrooke, 2 *Stra. H. L.* 310, remarks, "Brethren are not bound to maintain the unchaste widow of their childless brothers, (*Mitac.* ch. ii. s. 1, § 7,) nor has any authority been found for imposing it as a civil obligation on the son to maintain his mother if she be an adulteress.* If she be unchaste a woman must be turned out of doors, and without a maintenance, *R. A.* No. 2 of 1863; *Mad. Sel. Dec.* 366; *M. S. D.* 1857, p. 139; see *Stra. Man.* § 33.

Adultery uncondoned bars a suit against a husband for maintenance. A Hindoo adulteress, therefore, living apart from her husband, has no claim upon him for maintenance so long as the adultery is uncondoned, *Ilata Shavatri* v. *Ilata, Narayanan Nambudiri*, 1 *Mad. H. C. R.* 372. A claim by a Hindoo widow for an allowance from her husband's family was dismissed on proof of such impropriety of conduct on her part as, in the opinion of the Court, deprived her of all legal claim, according to the Hindoo law, to a maintenance from them, *Ranee Bussunt Koomaree*, v. *Ranee Kummul Koomera*, 1 *Morley's Digest*, 441, col. 2; see *Vyavahara Mayukha*, ch. iv. s. 11, § 12. See p. 8.

A woman divorced for adultery, who continued in adultery during her husband's life, and in unchastity after his death, is not entitled to maintenance out of the property of her husband, *Muttammal* v. *Kama Kshyammal*, 2 *Mad. H. C. R.* 337.

Harita says, If a woman, becoming a widow in her youth, be headstrong, (suspected of incontinency,) a maintenance must in that case be given to her for the support of life, (see *Nevada Chintamani*,) upon which there is this commentary in the *Mitac.*, "This passage is intended for a denial of the right of a widow suspected of incontinency to take the whole estate.

Where a widow succeeds as heir she takes, subject among other things, to defray the expenses of the education and of the nuptials of unmarried daughters, in the latter case, to the extent of a fourth part out of the husband's estate. Since sons are required to give

* Query, unchaste ?

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that allotment, much more should the wife or any other successor give a like portion, *Jim. Vahana*, ch. xi. s. 1, § 66. *Sir Thomas Strange*, 1 *H. L.* 173, adds, that she is bound also to maintain those whom the deceased was bound to support.

DESERTION OF HUSBAND BY HIS WIFE—IMPLIED AGENCY—POLYGAMY.—A Hindoo wife is not entitled to maintenance if she leave her husband without a justifying cause. Polygamy does not afford such a cause. If, therefore, a Hindoo husband, marry a second wife, and his wife thereupon leave him, the first wife has no implied authority to borrow money for her support, *Virasvami Chetti* v. *Appasvami Chetti*, 1 *Mad. H. C. R.* 375.

It seems the prohibition against a plurality of wives, save under certain circumstances, is merely directory and not imperative, *ib.*

WIDOW'S RIGHT TO RECOVER ARREARS OF MAINTENANCE.—No rule of Hindoo law precludes the recovery of arrears of maintenance. The only bar to the enforcement of a purely legal right is the lapse of the time required by the law of limitations to bar the remedy, and the statute does not operate when there is a constantly accruing right, and there is no authority for saying that a woman who is entitled to maintenance must, to obtain the same to which she is entitled, bring annual actions, *Venkopadhyaya* v. *Kavari Hengusu*, 2 *M. H. C. R.* 36; *S. D. A.* Dec. 1858; overruling *S. A.* No. 92 of 1863; see *R. A.* No. 4 of 1860; *Mad. Sudr. Judgts.* 1861, pp. 33, 35, and No. 31 of 1861; 1 *Mad. Sudr. Judgts.* 1862, p. 89.

WHERE HUSBAND'S PROPERTY PROVES DEFICIENT.—Where the husband's property proves deficient, the duty of providing for her is cast upon his relatives; and failing them, upon her own,—an obligation that attaches, though she should have wasted what was assigned her for the purpose, 1 *Stra. H. L.* 172.

GRANDMOTHER.—The grandmother as a member of the family is also entitled, 3 *Dig.* 12, 27, 30, 90.

STEPMOTHERS.—Stepmothers must be maintained with food and raiment, *Dagu Krama Sangraha*, ch. vii. § 3; 1 *Stra. H. L.* 172.

A son, on succeeding to his father's estate, must maintain his stepmother and her daughters, 2 *Macn. Prins. H. L.* 118.

SISTERS.—The married sisters are considered as provided for. *Mr Colebrooke* says, The law gives nothing to a married daughter where male issue is left. The claim of an unmarried daughter only is noticed, *Mitac.* ch. i. s. vii. § 14; 2 *Stra. H. L.* 311.

To unmarried sisters *Vijnyaneswara* allots a quarter of a share, *Mitac.* ch. i. s. vii. § 5, *et seq.*; *Yajnavalchya*, 2, 125. But the *Chandrika* and *Madhavya* countenance the opinion that the specified allotment intends only a sufficiency for the charges of the sister's nuptials, 2 *Stra. H. L.* 313; *Coleb.* This does not mean a fourth to each sister, to be deducted from the share of each

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brother, but a participation out of the whole equivalent to a fourth of a brother's share, irrespective of the number of brothers. The meaning is not that a fourth part shall be deducted out of the portions allotted to each brother, but that the girl shall be allowed to participate for a quarter of such a share as would be assignable to a brother of the same rank with herself, 1 *Stra. H. L.* 173; *Mitac.*, ch. i. s. vii. § 5, *et seq.*

A widowed sister, not otherwise provided for, is entitled to maintenance, 1 *Stra. H. L.* 173; 3 *Dig.* 92, *et seq.* *Sir Thomas Strange* is not supported by the authority he cites.

DAUGHTER.—A daughter living apart from her father without any sufficient cause has no legal claim upon him for maintenance, *Ilata Shavatri* v. *Ilata Narayanan Nambudiri*, 1 *Mad. H. C. R.* 372.

ILLEGITIMATE CHILDREN.—With the exception of illegitimate children of the Soodra class who take by inheritance, all others are entitled to a maintenance, *Mitac.*, ch. i. s. xii. § 3; 1 *Stra. H. L.* 70, 174. An illegitimate son of a Soodra by a concubine, not being a female slave, is entitled to maintenance according to Hindoo law, *Muttasamy Jagavire Zettapa Naikar* v. *Vankatasubha Yellain*, 3 *Mad. H. C. R.* 293. It would seem that the mothers of such children have also a claim for maintenance out of the property of their father, even where the property escheats to the king for want of heirs, *Mitac.* ch. ii. s. i. § 27, 28.

ILLEGITIMATE SON—KHATRI CASTE.—In the case of a disputed succession to the *Rajdom* and *Zemindary of Ramanugger* in Bengal, it was held that an illegitimate son of a *Khatri*, one of the three regenerate castes by a Soodra woman, cannot by the Hindoo law succeed to the inheritance of his putative father, but is entitled to maintenance out of his estate. In the case of the Soodra class, illegitimate children are qualified to inherit, *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn*, 7 *Moore's In. Ap.* 18.

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CHAPTER VI.

DISQUALIFICATION FOR INHERITANCE.

Mental and corporeal defects disqualify—Who are disqualified—Impotent—Out-caste—Lame—Blind—Deaf—Loss of a limb—A madman—Idiot—Qualified sons of a disinherited man may inherit with certain exceptions—Special rule for their wives and daughters—Religious order—Enemy to his father—Diseases—Vicious son—Dissipation of the family estate by gaming—Woman—Defect removed—Illegitimacy—Sons of woman married in irregular order—Sons of a woman of a higher class—Married in irregular order—Maintenance—Adoption.

MENTAL AND CORPOREAL DEFECTS DISQUALIFY.—There are certain defects, mental or corporeal, which according to Hindoo law defeat the right of inheritance. *Macn. Prins. H. L.*, 1 vol. p. 2, n., says, "Various diseases and various offences have been declared by the Hindoo legislators to be of such a nature as to disqualify for inheritance. It is problematical how far our courts would go in support of objections which must in some instances be deemed irrational prejudices," *ib.*

But as very few judicial opinions have been expressed upon many of the causes of disqualification for inheritance propounded by the old authorities on Hindoo law, we are compelled to take a cursory view of the ancient law; a more detailed notice of it being rendered unnecessary, partly for the above reason, and partly because of the elaborate enumeration of the disqualifying causes which is contained in 3 *Dig.* 35, *et seq.*, and 1 *Stra. H. L.* 152.

Sir Thomas Strange, *ib.* says, Like succession, exclusion from inheritance is connected with the obsequies of the deceased, from the incapacity to perform which the excluded are incompetent as co-heirs, *Jim. Vahana*, ch. xi. s. vi. § 31.

WHO ARE DISQUALIFIED.—An impotent person, whether naturally so or by castration, *Balam Bhatta; Mitac.* ch. ii. s. x., § 1 and n.; 1 *Stra. H. L.* 153; 3 *Dig.* 320; an out-caste,* or his issue, one lame, born blind or deaf, or who has lost the use of a limb, a madman, an idiot, one incurably diseased, as well as others similarly disqualified, *Yajnavalchya*, 2, 141, cited *Mayukha*, ch. iv. s. xi. § 1, 2; *Jim. Vahana*, ch. v. § 9, 10; *Mitac.* ch. ii. s. x. § 1; *Menu*, ch. ix. § 201; *Daya Krama Sangraha*, ch. iii. s. i.

* The loss of caste is a ground of exclusion, but this part of the law has been abrogated by the Indian Legislature, Act xxi. of 1850.

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An out-caste is one guilty of sacrilege or other heinous crime,—"his issue," the offspring of an out-caste, *Jim. Vahana*, ch. v. § 10.

Lame—is one deprived of the use of his feet, one who cannot walk is lame, *Jim. Vahana*, ch. v. § 10. But this would hardly be held now to be a disqualification.

A madman—affected by any of the various sorts of insanity, from whatever cause, *Mitac.* ch. ii. s. x. § 2.

An idiot—a person deprived of the internal faculty, meaning one incapable of discriminating right from wrong. A person not susceptible of instruction, *Jim. Vahana*, ch. v. § 9. The mental incapacity which deprives a Hindoo from inheriting on the ground of idiotcy is not necessarily utter mental darkness—a person of unsound mind, who has been so from birth, is in point of law an idiot. The reason for disqualifying a Hindoo idiot is his unfitness for the ordinary intercourse of life. *Tirumamagal Ammal* v. *Ramasvami Agyangar*, 1 *Mad. H. C. R.* 214.

Blind—destitute of the visual organ. A blind daughter could not be considered disqualified, because her right to inherit is placed on the ground of having male issue to perform her ancestor's obsequies; and blindness is no impediment to her having such issue.

Afflicted with incurable disease—affected by an irremediable distemper, such as a erasmus, or the like, *Mitac.* ch. ii. s. x. § 2.

Narada also declares an enemy to his father, an out-caste, an impotent person, and one formally expelled, take no share of the inheritance, even though they be legitimate, much less if they be sons of a wife by an appointed kinsman.

One afflicted with an obstinate or a grievous disease, and one insane, blind, or lame from his birth must be maintained by the family. But their sons may take the shares of their parents, 3 *Dig.* 303 ; *Mayukha*, ch. iv. s. xi. § 3 ; *Jim. Vahana*, ch. v. s. 11, 13 ; *Mitac.* ch. ii. s. x. § 9 ; *Daya Krama Sangraha*, ch. iii. § 2.

"Formally expelled" has reference to degradation from caste, and it means a person excluded from drinking water in company, *Jim. Vahana*, ch. v. § 3 ; 3 *Dig. Sankha* and *Lakhita*. The heritable right of him who has been formally degraded, and his competence to offer oblations of food and libations of water, are extinct. But the Emancipation Act xxi. of 1850 would prevent the operation of this law.

The doctrine of Hindoo law that out-castes are incapable of inheritance has no bearing upon the case of the members of new families which have sprung from persons so degraded, *Tarachand* v. *Reed Ram.*, 3 *Mad. H. C. R.* 51. This was a suit brought by a son against his father for recovery of his share of family property, real and personal, on the ground that the first defendant had wasted the family property by extravagance and by alienating portions of it, and he claimed, under the Hindoo law, one fifth of it. The first defendant urged that the common ancestor was a

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European, that the property left by him descended by will, and has since continued to do so, and that the appellant was only entitled to what the first defendant might leave him by will. The court,* in delivering judgment said, "The *Vyavahara Mayukha*, ch. iv. s. xi. § 1, and the *Daya Bhaga*, ch. v. § 10–12, were particularly referred to as showing the out-caste and his sons not only incapable of inheriting, but even excluded from the right to food and raiment, which is to be given to other excluded persons; and also as proving that the stigma extended to the offspring. Sec. x. of ch. ii. of the *Mitac.* embodies substantially the same doctrine. The passages from the *Daya Bhaga*, and those from the *Mitac.* occur in chapters treating of exclusion from inheritance. The theory of the *Daya Bhaga* is, that all wealth arises from partition, and the whole treatise is upon inheritance in a Hindoo family. It is manifest, therefore, that the only bearing of these passages is upon the question of a man's title, after degradation, to the property of a family still retaining caste. They have no bearing whatever upon the case of members of new families which have sprung from persons so degraded. The *Mitac.* too, is treating of the exclusion from the inheritance of that property which, according to the theory of the author, accrues to the Hindoo by birth, and it would be very singular if the civil death which follows upon the degradation from caste, in the view of these writers, did not destroy the right of inheritance to property in a family to which, on the theory of the Hindoo law, the out-caste was as one dead. Equally logical is the conclusion, that the children of the out-caste, born after his degradation are incapable of inheriting."

The consequences of degradation, or being out-caste, are enumerated by *Sir Thomas Strange*, 1 vol. 160. *Vide* also *Abraham* v. *Abraham*, 9 *Moore's In. Ap.* 195.

The power to degrade is in the first instance with the caste themselves, assembled for the purpose, from whose sentence, if not acquiesced in, there lay an appeal to the King's Courts, 1 *Stra. H. L.* 162; 2 *ib.* 267, *Ellis*.

The main feature in which degradation differs from other causes of disqualification is that it extends its effects to the son if born subsequently, though if born before he is entitled to inherit as if his father were dead, *Devala*, 3 *Dig.* 304; *Vishnu*, *ib.* 316; *Daya Krama Sangraha*, 3 *Dig.* 321; *Jim. Vahana*, ch. v. § 12. In all other instances of exclusion the son who is free from similar defects shall obtain his father's share of the inheritance, supporting with food and raiment him who is excluded, *Jim. Vahana*, ch. v. § 11, 12, 19; *Mitac.* ch. ii. sec. x. § 9; 3 *Dig.* 304, 324. *Sir Thomas Strange*, 1 vol. 163, adds, "The same right extending as far as the great-grandson."

THE DEFECT MUST HAVE PRECEDED PARTITION.—When the dis-

* *Innes* and *Holloway, J. J.*

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qualification of the out-caste and the rest who are not excluded from natural defects arise, before the division or descent of the property, they are debarred of their shares. But one already separated from his co-heirs is not deprived of his allotment, *Mitac.* ch. ii. s. x. § 6, and note 6; 1 *Stra. H. L.* 163. Hence adultery in the wife bars her right of inheritance, for loss of caste, unexpiated by penance and unredeemed by atonement it is forfeited, 1 *Stra. H. L.* 163; 2 *ib.* 269; *S.* 270; *C.* 272; *C.*, 3 *Dig.* 479. It has been decided that a woman guilty of adultery is not entitled to maintenance while the adultery is uncondoned by the husband, *ante* p. 95. But it does not appear to be yet decided whether, with reference to Act xxi. of 1850, loss of caste in consequence of adultery would bar a widow from inheritance. If condoned, it might be argued from the above decision that all rights to which she would have been entitled had she not committed adultery would be secured to her; it is doubtful, therefore, whether adultery, *per se*, is, under the existing change in the law, sufficient to exclude.

The law with reference to the loss of caste has been abrogated by the British Legislature, Act xxi. of 1850.

DUMB—one who is incapable of articulating sounds *Jim. Vahana*, ch. v. § 9.

DEAF, BLIND, AND DUMB, are excluded on the ground of the absence of the rights of initiation and investiture, owing to their being unable to master the necessary ceremonies.

THE QUALIFIED SONS OF A DISINHERITED MAN MAY INHERIT WITH CERTAIN EXCEPTIONS.—But the blameless sons, even of one from these causes disinherited, shall take a share according to the text of *Vishnu*, *Jim. Vahana*, ch. v. § 11; *Mitac.*, ch. ii. s. x. § 9; 1 *Stra. H. L.* 163; *Stra. Man.* § 226. The legitimate sons even of these are sharers of the patrimony, but not the sons born to a degraded man after the commission of the act which caused the degradation, nor those who are procreated on a woman of a higher class, that is, in the inverse order of the classes, their sons do not participate even in the property left by the paternal grandfather. "But their sons, whether legitimate or the offspring of the wife by a kinsman, (*Kshetraja*,) are entitled to allotments if free from similar defects," *Yajnavalchya*, *Mayukha*, ch. iv. s. xi. § 11; *Mitac.* ch. ii. s. x. § 10.

SPECIAL RULE FOR THEIR WIVES AND DAUGHTERS.—*Yajnavalchya* delivers a special rule concerning the daughters and wives of these, "Their daughters must be maintained likewise until they are provided with husbands. Their childless wives, conducting themselves aright, must be supported, but such as are unchaste should be expelled, and so, indeed, should those who are perverse." If she be *unchaste*, a woman must be turned out of doors, and without a maintenance, *Mayukha*, ch. iv. s. xi. § 12; *Mitac.* ch. ii. s. x. § 11, 12, 13, 14; see *Yajnavalchya*, ii. 148, 283–286; 1 *Mad. Sel. Dec.* of 1828, 366; *M. S. D.*, 1857, p. 139; 1 *Mad. H. C.*

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R. 372, *S. A.* No. 369 of 1862. But the commentator says, "Maintenance must not be refused solely on account of perverseness," *Mitac.* ch. ii. s. x. § 15.

Religious orders.—They who have entered into another order (perpetual student, hermit, ascetic) are debarred from shares, *Vasishtha*, *Mayukha*, ch. iv. s. xi. § 5; and the next heir succeeds as though the devotee were naturally dead, *Menu*, ch. ix. 211, 212; *Vasishtha*, *Mitac.* ch. ii. s. x. § 3; 3 *Dig.*; 1 *Stra. H. L.* 164.

So the religious pretender, and apostate from a religious order, *Jim. Vahana*, ch. v. § 14.

Enemy to his father.—One who hates his father is a professed enemy to him. Enmity is manifested by attempting his life, and so forth. But after the death of the father, by withholding the libations of water, and the like, which should be offered for his sake, 3 *Dig.* 303; *Jim. Vahana*, ch. v. § 13; *Mitac.* ch. ii. s. x. § 3; *Daya Krama*, *Sangraha*, ch. iii. § 3.

Disease.—As to the nature of disqualifying diseases, and the grounds upon which the disqualification proceeds, see 3 *Dig.* 304, *et seq.*; 1 *Stra. H. L.* 156. Disease is made a cause of disability from the idea that it is the mark and consequence of sin committed in a former birth, 1 *Stra. H. L.* 155, 156; *Stra. Man.* § 219. Nothing but the removal of the disease will take away the disability, *ib.*

A vicious son—Does not inherit if other sons exist, *Mayukha*, ch. iv. s. 11, § 8; *Jim. Vahana*, ch. v. s. 1; *Menu*, ix. § 201, 214. All those sons who are addicted to vice lose their title to the inheritance, *Daya Krama Sangraha*, ch. iii. § 5; *Yajnavalchya.*

Addicted to vice—That is, adhering to a contrary or improper course, such as drinking, gaming, &c. This rule appears to be more directory than mandatory. The subject is fully discussed in 3 *Dig.* 312, and 1 *Stra. H. L.* 157.

Dissipation.—There would be great difficulty in applying this rule in consequence of the impossibility of ascertaining the amount of guilt that would disqualify, as well as the nature of the crime, and English judges would be slow to recognise it; moreover, there is no case in which, according to Hindoo law, disability may not be expiated.

Mr Strange, *Man.* § 221, says, "The perpetration of crime in general is not to disqualify for inheritance. This alteration in the Hindoo law on the subject arises from the Hindoo criminal, having been superseded by British criminal law, and the offence of the criminal having been adequately provided for by the latter law, his sentence cannot be enhanced by the application to him also of the Hindoo law, *Judgt. of the Sudder Court in Sp. Ap.* 40 of 1858.

But when a party has stolen a portion of the common inheritance he is civilly disabled from claiming a share in the inheritance, *ib. Stra. Man.* § 222.

Dissipation of the family estate by gaming, &c.—We have

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discussed this subject under the head of Partition, see 3 *Dig.* 299; 1 *Stra. H. L.* 158, 224.

Sir Thomas Strange, 1 vol. 159, cites the following observations of *Mr Colebrooke*:—"In regard to the cases of disinheritance discussed in the *Digest*, b. v. ch. v. s. 1, corresponding with fifth chapter of *Jimuta Vahana* and the tenth sec. ch. ii. of *Mitac.*, I am not aware that any can be said to have been abrogated, or to be obsolete. At the same time, I do not think any of our courts would go into proof of one of the brethren being addicted to vice,* or profusion, or of being guilty of neglect of obsequies and duty towards ancestors. But expulsion from caste, leprosy, and similar diseases, natural deformity from birth, neutral sex, unlawful birth resulting from an uncanonical marriage, would doubtlessly now exclude, and I apprehend it would be so adjudged in our Adawluts. That the causes of disinheritance, most foreign to our ideas, are still operative, according to the notions of the law among the natives, I conclude from some cases that came before me when I presided in the Zillah Court. I will mention but one which occurred at Benares, at the suit of a nephew against his uncle to exclude him from inherited property, on the ground of his having neglected his grandmother's obsequies. He defended himself by pleading a pilgrimage to Gaya, where he alleged that he had performed them. His plea, joined with assurances of his attending to his filial duty in this respect in future, was admitted, and the claim to disinherit him disallowed."

Amongst a people with whom community of interest is the ordinary form of enjoyment of property, it is expedient that some security likely to be efficient should exist to protect families against the consequences in any of their members of vicious extravagance. The extravagant member does not dissipate his own wealth alone; the other members of the community have an interest in it in common with himself. Many authors exclude a man addicted to gaming and other similar vices, while others do not deprive them of their shares, 3 *Dig.* 300. But by whatever means they dissipate that wealth, their allotment on partition is diminished by so much as they have squandered and wasted; the difference, if against them, constituting a debt, leaving it to the pursuit of courses more distinctly criminal to work at once an entire forfeiture, 3 *Dig.* 298, 300; 1 *Stra. H. L.* 158; but see *ib.* 224, *post*, Partition.

Women.—A woman is exclüded for like defects, and therefore the wife, daughter, mother, or any other female may be disqualified for the like defects, *Mitac.* ch. ii. s. x. § 8.

Barrenness does not disqualify, *Stra. Man.* § 225.

Defect removed.—If the defect be removed by mendicaments, penance, and atonement, at a period subsequent to partition, the right

* See 1 *Beng. Rep.* 144, where a will by a father partially disinheriting one of his sons on the ground of vicious conduct was sustained on appeal.

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of partition takes effect by analogy to the case of a son born after separation. When a son has been separated, one who is afterwards born of a woman equal in class, shares the distribution, *Mitac.* ch. ii. s. x. § 7.

If after division, virility, or the other absent qualification, be regained by medicines or other means, the person will then receive his share as a son born after partition does, *Mayukha*, ch. iv. s. xi. § 2.

Illegitimacy.—Illegitimate offspring, save among Soodras, cannot inherit, 1 *Stra. H. L.* 165; *Stra. Man.* § 228. Among Soodras the bastard gets a smaller share than the others, *Jim. Vahana*, ch. ix. § 29, 30.

Sons of a woman married in irregular order.—The sons of a woman married in irregular order, as well as he who is produced through a kinsman, (sagotra,) and an apostate from a religious order, never obtain the inheritance, *Katyayana Mayukha*, ch. iv. s. xi. § 5; *Jim. Vahana*, ch. v. § 14, 15. For an explanation of the expression, "produced through a kinsman," see *Mayukha*, ch. iv. s. xi. § 6.

Sons of a woman of a higher class.—If sons be begotten by a husband on a wife, sprung from a higher class, they shall not take the inheritance, *Mayukha*, ch. iv. s. xi. § 7; *Jim. Vahana*, ch. v. § 15.

But the son of a woman married in irregular order may be heir, provided he belong to the same tribe with his father, and so may the son of a man of a different but superior tribe by a woman espoused in the regular gradation. The son of a woman married to a man of an inferior tribe is not heir to the estate. Food and raiment only are due to him by his kinsman; but on failure of them he may take the paternal wealth, *Jim. Vahana*, ch. v. § 16.

Maintenance.—An impotent person, an out-caste and his issue; one lame, a madman, an idiot, a blind man, and a person afflicted with incurable disease, as well as others similarly disqualified, must be maintained, *Yajnavalchya* cited *Mayukha*, ch. iv. s. xi. § 1; *Menu.* ch. ix. 202; 3 *Dig.* 303. All those excluded from participation must be maintained during the rest of their lives by those who get the estate, *Mayukha*, ch. iv. s. xi. § 9; *Jim. Vahana*, ch. v. § 10; *Mitac.* ch. ii. s. x. § 5. Except those entering another order, out-castes and their sons, *Mayukha*, ch. v., § 10; *Jim. Vahana*, ch. v. § 11; *Daya Krama Sangraha*, ch. iii. § 15, 16. The penalty of degradation is incurred if they be not maintained, *Mitac.* ch. ii. s. x. § 5; *Menu*, ch. ix. § 202.

The incompetency of the wives of disqualified persons to inherit has also been declared by *Yajnavalchya.* Their childless wives, conducting themselves aright, must be supported, but such as are unchaste should be expelled; and so, indeed, should those who are perverse. Their daughters also should be maintained until

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provided with husbands, *Daya Krâma Sangraha*, ch. iii. § 17 ; see *Stra. Man.* § 230.

If those labouring under disqualification should marry, the offspring of such as have issue shall be capable of inheriting, *Menu*, ch. ix. § 203 ; *Jim. Vahana*, ch. v. § 17, 18. If they be free from similar defects, their daughters must be maintained until married, and their childless wives must be supported during life, *Jim. Vahana*, ch. v. § 19.

Adoption.—Of these (two descriptions of offspring, legitimate offspring, and issue of the wife) the impotent man may have that termed issue of the wife, the rest may have legitimate progeny likewise. The specific mention of "legitimate issue" and "offspring of the wife" is intended to forbid the adoption of other sons, *Mitac.* ch. ii. s. x. § 11, so that no adoption can take place; such a son, if adopted, could not get anything which his father was disqualified to inherit. See "Adoption."

Religious institutions.—This is another description of property which is referred to in other portions of this work, and will be found under this head in the index.

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CHAPTER VII.

ALIENATION.

SECTION I.

Gifts inter vivos—*Gift binding as against alience—Manasaputra—For payment of debts of undivided Hindoo by widow—Father-in-law of Reddi caste cannot disinherit his heir—Childless widow where collateral heirs of husband—In default of male issue widow succeeds to her husband's estate without the power of alienating what devolves upon his heirs after her death—The question and authorities discussed—Stridhana—No restrictions on alienation except land, the gift of husband—Saudaiyca—Will—Saudaiyca Stridhana—Second marriage, right of wife to sue for—Will—Excluding one of four sons from the family estate—Shrotriyam conferred for life—Each holder can only alienate for his own interest—Sunnud, or maintenance-deed—Construction of "from generation to generation"—Subject to allowance for certain classes of the family—Tora Goras is alienable—Zemindar cannot alienate his zemindary, nor encumber beyond his own life—Alienability of share of undivided family property—Partition—Malabar law—Sale by consent of all the members of the tarawad—The assent of the anandravan is necessary.*

GIFT INTER VIVOS.—It is competent to a Hindoo to make a gift of his property by deed *inter vivos*, (which is in the nature of a will) 1 *Stra. H. L.* pp. 17, 18, 258; *Eshanchund Rai* v. *Eshanchund Rai*; 1 *Beng. Sud. D. A. R.* 2; *Sreemarani Rai* v. *Bhya Sha*, *ib.* 29. It would not perhaps be good if given to one son in exclusion of the others.

GIFT BINDING AS AGAINST ALIENEE—MANASAPUTRA.—By the Hindoo law a man may make a gift of any of his property binding as against himself. Where a Hindoo made a gift to a person, whom he said he had taken as his *manasaputra*,* he cannot set it aside on the ground that he made a mistake in supposing that the donee could perform his funeral rites, *Abhachari* v. *Ramachindrayya*, 1 *Mad. H. C. R.* 393. *Per curiam*, nothing is clearer than the proposition, that by Hindoo, as by English law, any man may make a gift of any of his property binding as against himself.

FOR PAYMENT OF A DEBT OF AN UNDIVIDED HINDOO BY WIDOW.—The widow of an undivided Hindoo has no right to sell his property for payment of his debts, even if self-acquired, *Namsevaga Chetti* v.

* From *Can. Manasu* (borrowed from *Skr. Manas*, μενος,) and *Putra son*, *Stokes*.

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Sevagami, 1 *Mad. H. C. R.* 374. Her husband's brothers were living consequently they succeeded to her husband's property, and were bound to pay his debts.

A father-in-law, although of the Reddi caste, cannot disinherit his heir in favour of his son-in-law, *Tayumana Reddi* v. *Perumal Reddi*, 1 *Mad. H. C. R.* 51.

The plaint set forth that plaintiff's father-in-law, having no issue male, and having given plaintiff his only daughter in marriage, had, in accordance with the custom of his caste, executed a deed conveying all his property to the appellant absolutely. After his death the defendants, the first and third of whom were his brothers, and the fourth who claims to be his paternal nephew and adopted son, forcibly carried away the property comprised in the deed, and the suit was instituted to recover this property. The district munsiff passed judgment in favour of the plaintiff, and the civil judge confirmed this decree on appeal. The High Court reversed the decree as being at variance with the known and fundamental rules of Hindoo law. The admission said to be made by the fourth defendant—viz., that a custom prevailed amongst persons of the Reddi caste, of constituting a son-in-law heir to the property of his father-in-law, is no admission of the legality of the practice, and that this custom has not the force of law has been expressly declared by the *Sudr. Court in S. A.* No. 89 of 1859, p. 250; *M. S. D.* per *Strange and Frere, J.J.*

CHILDLESS WIDOW WHERE COLLATERAL HEIRS OF HUSBAND.—If there be collateral heirs of the husband, the widow cannot alienate the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of the husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the latter she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary, or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law, that where that consent is given the purpose for which the alienation is made must be proper. Nor does it appear to their lordships that the construction of Hindoo law which is now contended for can be put upon the principle "*cessante ratione cessat ipsa lex.*" It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power is imposed. Nevertheless, authorities from *Menu* downwards may be cited to show that, according to the principles of Hindoo law, the proper state of every woman is one of tutelage, that they always require protection, and are never fit for independence, *Sir Thomas Stra. H. L.* 242, cites the authority of

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Menu for the proposition that if a woman has no other controller or protector, the king shall control or protect her. Again, all the authorities concur in showing that, according to the principles of Hindoo law, the life of a widow is to be one of ascetic privation, 2 *Coleb. Dig.* 459. Hence, probably, it gives her a power of disposition for religious, which it denied her for other purposes. These principles do not seem to be consistent with the doctrine, that on the failure of heirs a widow becomes completely emancipated, perfectly uncontrolled in the disposition of her property, and free to squander her entailed wealth for the purpose of selfish enjoyment.

Their lordships are of opinion that the restrictions on a Hindoo widow's power of alienation are inseparable from her estate, and that their existence does not depend on that of heirs capable of taking on her death. It follows that, if for want of heirs, the right to the property, so far as it has not lawfully been disposed of by her, passes to the crown—the crown must have the same power which an heir would have of protecting its interests by impeaching any unauthorised alienation by the widow, *the Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, 8 *Moore's In. Ap.* 553.

In default of male issue widow succeeds to husband's estate without power of alienating what devolves upon his heirs after her death.—According to Hindoo law the widow, in default of male issue, is entitled to succeed to the whole of her deceased husband's estate. But her title to such estate is only as tenant for life, and she has no power to alienate or devise any portion of her husband's estate, which on her death devolves on his legal heirs, *Keerut Sing* v. *Roolahul Sing*, 2 *Moore's In. Ap.* 331.

This was an appeal from the *Sudder Dewanny Adawlut* of Bengal, in three suits brought for the recovery of certain property in the district of Benares. The following questions and answers were put to and obtained from the pundits of the Provincial Court.

Ques. The whole of the Zemindary having descended to Rajah Juswund Sing, after having been previously held by several generations, and Rajah Juswund Sing having died without children, leaving his widow as his heiress, if the said wife, by the execution of a wasseeyut-namah, (a will or testament,) transfer the Zemindary to Keerut Sing, will such transfer be legal according to the Sastras or not?

Ans. A Hindoo woman has not the power of granting property to another. If the woman referred to give the property to a near relation, who may possess strong claims upon the property, still the transfer will be illegal without the consent of the heirs.

The Judicial Committee of the Privy Council held that there is not the least doubt that this answer, if a true exposition of the law, must govern the claims of all parties to the property. It is in conformity with the law as laid down and acted upon in former cases, *Rajunder Narain Rae* v. *Bijai Govind Sing*, 2 *Moore's In. Ap.* 181, 191.

The question discussed and authorities cited.—In *Cossinaut Bysack* v. *Hurroosoondry Dosse* and *Cummolemoney Dosse*, 2 *Morl.*

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Dig. p. 198, (1819,)* a very important judgment was delivered in Bombay by Chief-Justice East bearing upon the question as to the rights of a childless widow to the property of her deceased husband, and in which all the authorities are reviewed.

This case was heard in Dec. 1814, when it was decreed Bissonaut Bysack (the succession to whose property was in litigation in the suit) having died without issue,† the defendant, Hurroosoondry Dossee, as his widow was, by the Hindoo law, entitled to an interest for her life in the whole of his immoveable, or real estate, and to an absolute interest in the whole of his moveable, or personal estate, and directing an account of the personal estate. There were subsequent proceedings upon a re-hearing, and upon a supplemental bill, filed for the purpose of establishing certain testamentary papers,‡ the proof of which failed altogether; and on the account taken before the master, the personal estate of Bissonaut Bysack was in Nov. 1815 reported by him to amount to Rs. 274,700, in company's securities, at 6 per cent., together with other personal estate of small amount. On which an order was made on the 8th April for transferring those sums to the account of Hurroosoondry, and a final decree passed.

A bill (April 1817) of review was filed (on the 9th Sept. 1818) assigning for error in the interlocutory decree of Dec. 1814, that Hurroosoondry, the widow of Bissonaut Bysack, is not by the Hindoo law entitled, as declared by that decree, "to an absolute interest in the whole of his moveable, or personal estate, or any part thereof, nor to any interest in the same, other than for the term of her natural life, subject to the several powers, restrictions, and qualifications, in and by the Hindoo law in such case ordained and provided." Other errors are assigned in the decree of the 8th of April 1816; that as Hurroosoondry Dossee is a childless widow of a Hindoo, and incapable again of contracting wedlock,§ and the complainants are the next legal representatives of her deceased husband, Bissonaut Bysack, and as such entitled to the whole of his estates and property on her decease; the company's securities and cash standing in the books of the Accountant-General to the credit of Bissonaut Bysack ought not to have been decreed to be transferred generally to her credit, but only in trust for her, or for her use and enjoyment during her natural life, subject to such powers, restriction, and qualifications, as are by Hindoo law provided. And also for that it is not ordered by either of the said decrees that Hurroosoondry Dossee should abide or reside with and under the care, protection, and guardianship of the complainants, who, as surviving brother of Bissonaut Bysack, are alone

* The decision in this case was affirmed on appeal by the Judicial Committee of the Privy Council on the 24th June 1826. See *Cl. R.* 1834, 91.

† It was also a part of the decree that Bissonaut Bysack, being at the time of his death an infant under sixteen, could not by the Hindoo law make a will Note by *Sir E. H. East.*

‡ A supposed will of the father of Bissonaut Bysack.

§ Now altered by Act xxi. of 1850, see *ante*, p. 33.

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entitled by the Hindoo law to the care, guardianship, and protection of his widow.

To this bill there is a general demurrer.

Upon the last ground of error the pundits have uniformly answered that the widow was not bound to live with her husband's relatives.

The 8th question put by the Court to their pundits,—If a widow, from a just cause, cease to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate?

Ans. If a widow, from any other cause but for unchaste purposes, cease to reside in her husband's family, and take up her bode in the family of her parents, her right would not be forfeited.

Here there was a good cause at the time—viz., the extreme youth of the wife, and no pretence was made of the prohibited cause.

The great question which has been raised is, Whether the widow take the personal estate devolving on her at the death of her husband, absolutely, as the decree has pronounced, or merely in a, and what, qualified manner? And if the decree be wrong in this respect, I am of opinion that it is also wrong in limiting the real estate to her for the express term of her life. I shall consider,

1st, What right the husband had over his real or personal estate.

2d, What interest the widow has in either, by devolution, on his death without male issue, according to the text-writers on the Hindoo law, and other Hindoo authorities, either native, or British.

3d, How far the decisions which have taken place in this court have decided the question.

It seems to be clear, from the *Daya Bhaga*, that a Hindoo may dispose of his self-acquired property, whether real, or personal, as he pleases. But with respect to ancestral property, the case seems different according to the same book. Chap. ii. pars. 9–14, treating of the rights of a father in ancestral land, or in a corrody, or chattels, and observing that chattels, from their association with land, must mean slaves, and not chattels generally, says that a Hindoo cannot make unequal distribution of ancestral estate among his sons as he may with regard to his own acquired wealth. Par 20 says, that upon partition of ancestral wealth, (by which is certainly to be understood real, or immoveable estate from what precedes and what follows,) which can only take place by the choice of the father alone, and not of the sons, the father is entitled to a double portion, or, as it is said in par. 73, to two shares. Then follows par. 22—"The father has ownerships in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions, and has power to distribute them unequally as *Yajnyawalcya* intimates; 'the

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father is master of the pearls, gems, corals, and of all moveable property.'" But neither father nor the grandfather is so of the whole immoveable estate.

In par. 23 it is said, "Since the grandfather is here mentioned, the text must relate to his effects. By saying 'all,' after specifying gems, pearls, &c., it is shown that the father has authority to make a gift, or any similar disposition of all effects, other than land, &c.; but not of immoveables, a corrody, and chattels, (*i.e.* slaves,)" &c.

By these and several other passages which follow—and others might be cited to the same effect—it distinctly appears that moveable property, or, as we should express it, personal property, (excluding slaves, who, as in the ancient law of England, are considered as realty,) though descending to the male heir from his ancestor, is held by him, at his own absolute disposal, in the same manner as self-acquired property of his own. But that over ancestral property he has only a qualified right of disposition. He is only entitled to a double share of it upon partition amongst himself and his sons.

He is not, the text cited says, the master of the whole immoveable estate.

The same distinction holds in the case of a son born after a partition of ancestral property between father and sons: the afterborn son is entitled to an equal share of the land, and his brothers must make contribution from their shares; and so it is of a corrody, or of slaves. But it is otherwise as to ancestral moveable, or personal property, partitioned before the birth of the younger son, concerning which no contribution is directed; for, says the book, (citing *Srikrishna*,) "gems, pearls, &c., are similar to a man's own acquired wealth." Again, in treating of the participation of sons by women of various tribes, the *Daya Bhaga* states the law to be express, that the sons of twice born classes have a right to the hereditary field, and the Soodra is alone excluded. So a passage of law expresses, "The son begotten on a Soodra woman by a man of a twice born class, is not entitled to a share of the land, but one begotten of her being of equal class, shall take all the property, whether land, or chattels. Thus is the law settled."

The same doctrine is laid down in the *Mitacshara*, (Benares law.)

I mention these authorities for two purposes; first, to meet the argument which was urged at the bar, that the Hindoo law, as set forth in the *Daya Bhaga*, and prevailing in Bengal, makes no distinction as to real, or personal property, except in the two certain cases mentioned—viz., 1st, Where the father attempts to dispose of real property in his lifetime without the assent of his sons, and 2dly, With regard to the peculiar property or *stridhana* of the wife, (or widow,) of which she can only dispose of the personalty, but not of the realty; and that the mention of these two exceptions only shows that the general rule is otherwise, whereas it plainly

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appears from these authorities that the general distinctions run through the Hindoo law as recognised in the *Daya Bagha* for Bengal; and that it is incumbent upon those who deny the widow's absolute right over the personalty to show, by express authority, she takes a different estate in it from her husband, and from all others who would succeed him. And that for this purpose it is not sufficient to show that the right of succession to real and personal property is in the same person or persons, by the Hindoo law, for that is clearly established and universally admitted, but the right of disposition over it by the party so succeeding, is a distinct thing.

The second purpose in mentioning these authorities is more immediately important to the decision of the question in judgment, whether the decree assigning to the widow the personal estate absolutely, and the real estate for her life only, can be supported without express authority taking that distinction in respect of her succession to husband's property; it being certain that it is an estate different from that which he held, and from that which she would transmit in the same property to the next heir, or successor.

It is a different question, whether, if the father convey ancestral landed property without the assent of his sons, such conveyance will be invalid against them, or whether it be only sinful in him, and the conveyance would be good? In one place it is said, (*Daya Bhaga*, c. ii. 23,) that the prohibition of giving the whole immoveable ancestral estate forbids the gift, or other alienation of the whole, because immoveables, and similar possessions are means of supporting the family, "and hell is the man's portion if they suffer," which seems to imply a religious and not a legal prohibition; and it is admitted (par. 24) that the prohibition is not against the transfer of a small part, not incompatible with the support of the family; and even the whole immoveable and other property (par. 26) may be sold if necessary for their support, or his own. In the comment on the last paragraph, *Srikrishna* is cited in the margin thus, "In like manner, if there be no land, or other permanent property, but only jewels or similar valuables, he is not authorised to expend the whole, for the reasons hold equally. But the declaration of a power over moveables supposes the existence of both sorts of property. It should be so understood."

This seems to put the whole law of alienation, including self-acquired, as well as personal ancestral property, upon the ground of a religious and moral prohibition, to dispose of any of it which may be necessary for the maintenance of the family; to which extent it certainly cannot be supported as a legal prohibition so as to render the transfer invalid. And though it is stated by *Vyasa* (*Daya Bhaga*, c. ii. 27,) that one parcener may not without the consent of the rest make a sale, or gift of the whole immoveable estate, nor of what is common to the family; yet in par. 28 it is said that those texts of *Vyasa* exhibiting a prohibition, are intended to show a

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moral offence, "and are not meant to invalidate the sale or other transfer," and (par. 29) that other like texts, such as a gift or sale of immoveables or bipeds, acquired by a man himself, should not be made by him unless convening all his sons, must be interpreted in the same manner, and then it concludes, (par. 30,) "Therefore since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null, for a fact cannot be altered by a hundred texts."

This, it is true, is applied particularly to the cases of a gift or sale by a parcener of his share of that which is held in common, and of self-acquired property of both sorts; but the principle is more general, and at all events it is sufficient to make me pause before I give assent to an answer given by the pundits in this case, (in which they differed from five of their brethren,) that a gift of money or other moveable property made by the widow, other than such as is allowed by law, is invalid, and may be recovered back, not only by the next heir, but by herself, and in which they differed from the Sudder pundits, who thought the gift valid against herself, though not against the next heir.

And though in partition of ancestral property between a father and his sons, he is limited to take a double or two shares, as before stated, yet in some passages (*Daya Bhaga*, c. ii. 46) it seems to be admitted that "he is competent to sell, give, or abandon the property," and, on the other hand, though it seems admitted in a variety of passages, that a father may do what he pleases with his self-acquired property, yet at the conclusion of chap. ii. of the *Daya Bhaga*, par. 34, &c., it is laid down in the common terms of prohibition, "But let not a father distinguish one son at a partition made in his lifetime, nor on any account exclude one from participation without sufficient cause;" which, unless it be taken to be merely monitory, is in express contradiction to all that was said before.

In the case of *Nemoychurn Mullick* in this Court in 1807, or 1808, *Mr Compton* stated that it was considered that though a Hindoo could not properly dispose of patrimonial estate without the consent of his sons, yet if he do, the disposition is valid.

But whatever restrictions may, by law, or by religious or moral prohibitions, be imposed on the husband in respect to the partition, or voluntary gift, or alienation of the whole of his ancestral real property, the whole of it appears to be answerable in his hands for debts; and this not only for debts contracted by his ancestor, but by himself; and in this respect, also, his estate must differ from the estate for life only, decreed to the widow in the land, though the estate is answerable in her hands for the debts of her husband.

There are other parts of the *Daya Bhaga* where an act is declared to be unlawful, and yet valid, such as a partition by brothers without the consent of the mother in her lifetime.

Having shown what estate the husband has in his real and personal ancestral estate, I proceed to the second question. What interest

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the widow does take in the real and personal property of her husband by devolution of law on his death without male issue, according to the text-writers on the Hindoo law?

If the *Ratnacara* and the *Chintamani* be authorities for the Hindoo law in Bengal, they must decide the question at once; for they are plain and explicit upon the very point.

For in commenting upon the text of *Kátyáyana*, viz.—"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property (*i.e.* as before stated, her husband's estate after his decease) until her death;" the author of the *Ratnacara* observes, that the property of her husband (spoken of in the text) is property which has been the wife's in right of her relation to him as her husband. It is of two sorts—1st, That which, upon his decease, became her property for want of other preferable successor; 2d, That which in his lifetime became hers in right of her relation to him. In regard to the first, the law declares that she may place, or dispose of effects, other than immoveables, as she pleases, and remaining with, that is, near her venerable protector and natural guardian, and preserving unsullied the bed of her lord, she may so pass her time. Concerning the immoveable estate, the law provides, "Let her enjoy it until her death, and afterwards let the heirs take it."

The comment of *Vachespati Misra*, author of the *Chintamani*, is to the same effect, "The heritage of her husband is wealth of her husband, being either that which became the woman's property when he died, for want of another, a preferable successor, or which became hers by his consent in his lifetime." Concerning the first, the law declares, "Let the woman place her husband's heritage as she pleases when he is deceased." This, however, regards effects other than immoveables; but in respect of the immoveable property, the law provides, "Let her enjoy until her death with moderation;" that is, not expending too much, &c. Thus in the case of the immoveables of her deceased husband, which have devolved on the wife, she has not power to give, or alien them.

In the MS. judgment of *Mr Harrington* upon the case of *Bhya Jha* in 1812, in the *Sudder Dewanny Adawlut*, which I have seen, after observing that the *Ratnacara* and the *Chintamani* are works of the highest authority in Tirhoot, he concludes, after stating the passages: "From these passages of most undoubted authority it is evident that the widow has power to consume, or to give, or to sell in her lifetime, the moveables which may have devolved upon her by the death of the husband, but has no power over the immoveables beyond a moderate and frugal enjoyment of them. After her death, the estate which she enjoyed frugally during her lifetime shall pass to the heirs of her husband."

This doctrine of the *Ratnacara* and the *Chintamani* has the merit (not a little one of the Hindoo law) of being clear and intelligible, and all must agree that it gives a wholesome rule with respect at

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least to the real property ; and except in cases where the personal property is very considerable, it would give a convenient rule for practical purposes for that also. But *Mr Colebrooke*, in his letter of the 27th of Feb. 1812, addressed to *Mr Harrington* upon the subject of *Bhya Jha's* case, then in judgment, says that this doctrine, which he considered to be that of the Mithila school, "is no doubt at variance with the doctrine of the Bengal school, which controls the widow even in the disposal of personal property." And *Mr Harrington*, in the MS. judgment in the case before referred to, only states that the *Ratnacara* and *Chintamani* "are unquestionably works of the highest authority in Tirhoot;" thereby seemingly to admit of a different doctrine in Bengal as affirmed by *Mr Colebrooke*, and the case then in judgment appears by the terms to have arisen in a part of the country subject to the Tirhoot law, and there is no case in *Mr Harrington's* printed reports of decisions in the *Sudder Dewanny Adawlut*, in which the same doctrine has been applied to Bengal.

It further appears, upon inquiry from those who are likely to be best acquainted with the decisions and practice of the *Sudder Dewanny Adawlut*—and in referring to this source of information I am guided principally by the statements which I heard in Court, for my own means of information out of Court have been very limited, and not satisfactory—to be the general understanding of the persons acting in, or connected with, that Court, that the widow takes, in Bengal, the same estate, with the same power of disposition over it, in the personalty as in the realty devolving to her by the death of her husband without sons, and that this has always been considered to be the rule in that Court.

If this be so, it is deserving of great weight; for the jurisdiction of that Court must necessarily afford frequent occasions for raising the question, if any doubt were considered as attaching to it; and yet it is so singular that several cases should occur in the printed Reports concerning the widow's right of alienation, or disposition over the whole, or parts of the realty, which it might be imagined was least likely to be attempted, or sustained, if her power of disposition over even the personalty was denied, without any distinct question raised, or decision upon the latter. Thus, however, the case seems to stand in the *Mofussil*, resting, so far as I have been able to collect (but, as I have before stated, my own means of information have been very slender and unsatisfactory) upon opinion merely, but that opinion strong and general against the doctrine of the Mithila school, as applied to Bengal, upon the point now in judgment.

The same opinion was communicated by the two pundits of that Court, who agreed in all points with our own pundits, except as to the invalidity of a gift of immoveable or moveable property by the widow as against herself. The general doctrine of these pundits (with the exception I have mentioned) is to be found in the answer given by our Court pundits upon the argument of the case.

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They rest their doctrine upon the authority of the *Daya Bhaga* and *Daya Tatwa*, as overruling in Bengal the authority of the *Ratnacara* and the *Chintamani;* not denying the authority of these last-mentioned books when uncontradicted or uncensured by the former, but affirming that the *Ratnacara* and the *Chintamani* are contradicted and overruled by the *Daya Bhaga* and *Daya Tatwa* upon the point in judgment, which latter books, they affirm, give only a life interest to the widow in both the real and personal estate, with the power of disposition as to both for the benefit of her husband's soul, observing moderation, but without authority to dispose of either for worldly purposes unconnected with religious purposes, without the consent of her deceased husband's kinsmen.

The five pundits who were opposed to the others affirm the authority of the *Ratnacara* and *Chintamani* in giving to the widow an independent authority over the moveable part of her husband's estate, though not over the fixed property other than for her life; and they deny that this doctrine is contradicted, or declared inadmissible by the *Daya Bhaga* or *Daya Tatwa*, in neither of which latter, they say, is the subject particularly noticed; and they contend that by these last-mentioned authorities the donation of the property by the widow is valid, though they admit that the donor incurs moral guilt by it.

This narrows the inquiry to this point—viz., Whether the *Daya Bhaga* (which is admitted by all to be the ruling authority for Bengal) does invalidate the disposal of personal property by the widow at her pleasure? in which case it could not properly be decreed to her absolutely, or whether she has the absolute right of disposition over it by law, however she may incur religious or moral guilt by such disposition for worldly purposes of her own? The most material passages of the *Daya Bhaga* are to be found in the 4th and 11th chapters, but principally in the last. The 4th treats of the succession to a woman's property, which for this purpose is divisible into property given to her in the lifetime of her husband, and property of her husband devolving to her upon his death. The former is considered as her own peculiar property or stridhana which in general she may dispose of as she pleases, except immoveable property given her by her husband, in which she has only a life interest, and upon her death it descends to his heirs, and not to her parental heirs; and except immoveable property given to her by her own parents, in her maiden state, which always goes to her brother, if she die without issue, chap. iv. sec. iii. part 12.

The *Daya Bhaga* (c. iv. s. i. § 9) refers to this head of the peculiar property of a woman given to her in the lifetime of her husband. "*Katyayana* says, 'Let the woman place her husband's donation as she pleases when he is deceased;'" which is construed to mean, "Wealth given to her by her husband she may dispose of as she pleases when he is dead," &c., in contradistinction to the opinions before cited of the authors of the *Ratnacara* and *Chinta-*

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mani, which extend it "to property which has devolved on a widow on the death of her husband, leaving no preferable heir, as well as to property accruing to her during his lifetime by his consent, &c.; and contrariety of construction is expressly stated in the annotation upon the passages cited from the *Daya Bhaga*. This fourth chapter also asserts (s. i. 12) the right of the widow to take "the whole estate of her husband who leaves no male issue," but reserves the full discussion of that question to the eleventh chapter.

The eleventh chapter is that on which the judgment will principally depend.

Its title is, "On succession to the estate of one who leaves no male issue."

Sec. 1 is on the widow's right of succession, par. 2: *Vrihaspati* says, "In Scripture and in the Code of Law, as well as in popular practice, a wife is declared by the wise to be half the body of the husband, &c., of him whose wife is not deceased half the body survives; how then should another take his property if half his body is alive?" And in chapter xi. s. 1, 26, "nor is there any proof of the position that the wife's right in her husband's property accruing to her from her marriage, ceases on his demise. But the cessation of the widow's right of property, if there be any male issue, appears only from the law ordaining the succession of male issue." And again, in the same chapter and section, par. 54, it is said, "Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsman, a father, &c., be present," &c. And in par. 2, "If her husband die before her, she shares his wealth, this is primeval law. Having taken his moveable and immoveable property, the precious and base metals, the grains, the liquids, as well as the clothes, let her duly offer his monthly, half-yearly, and other funeral repasts. With presents offered to his manes, and pious liberality, let her honour the paternal uncle of her husband, his spiritual parents, and daughters, sons, and children of his sisters, his maternal uncles, and also ancient and unprotected guests and females of the family. Those near or distant kinsmen who became her adversaries, or who injure the woman's property, let the king chastise by inflicting on them the punishment of robbery." Par. 3 of chap. xi. sec. 1, goes on to say, "By these seven texts, *Vrihaspati*, having declared that the whole wealth of the deceased man, who had no male issue, as well as the immoveable, as moveable property, the gold and other effects, shall belong to his widow, although there are brothers of the whole blood &c., and having directed that any of them who become their competitors for the succession, or who themselves seize the property shall be punished as robbers, totally denies the right of the father, the brothers, and the rest, to inherit the estate if a widow remain." The fourth par., designating the order in which the heir to the estate of one who dies, leaving no male issue, places the

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wife at the head of the list, the daughters next, then both the parents, brothers, &c. The sage (named before propounds the succession of the widow in preference to all the other heirs. Par. 5 says, "So *Vishnu* ordains 'the wealth of him who leaves no male issue goes to the wife, on failure of her it devolves on daughters; if there be none it belongs to the father,'" &c. Par. 6 declares, "By this text, relating to the order of succession, the right of the widow to succeed in the first instance is declared. It must not be alleged that the mention of the widow is intended merely for the assertion of her right to wealth sufficient for her subsistence. For it would be irrational to assume different meanings of the same term, used only once by interpreting the word wealth as signifying the whole estate in respect of brothers and the rest, and not the whole estate in respect of the wife." Par. 7 says, "Thus *Vrihat Menu* says, 'The widow of a childless man, keeping unsullied her husband's bed, and preserving in religious observance, shall present his funeral oblation, and obtain his entire share.'"

It is clear, from all these texts, that the widow of one who dies without male issue takes the entire share or estate of her husband, both in his moveables and immoveables, without distinction, and she takes his whole share or estate, either as the surviving half of his person, as it is said in par. 2, or as his first and immediate heir, as it is said in par. 4 or as it appears from par. 6, by necessary construction of the law, which gives over his wealth or whole estate to the collateral male heirs, in default of wife or daughters, by the same words used once only. The same par. expressly negatives "that the mention of the widow as the first heir is intended merely for the assertion of her right to wealth sufficient for her subsistence," for the law gives the whole estate of her husband by the same word that it gives it to the whole male collaterals in her default.

The natural construction of most of these texts would lead to the conclusion that the ultimate or absolute right of property, or the fee, as we should call it, in relation to real estate, was not in abeyance, or vested over in remainder during the widow's life, but that it is as much in her as it was in her husband during his life, or as it would be in his next collateral male heir after her death without female issue, and from thence it would seem liable in her hands for the debts of her husband. And yet I believe that in the bill of foreclosure, &c., it has been most usual to add the first male heir in remainder, but this may be done in particular cases, *pro majori catelâ.*

There are some of the expressions, however, in these texts that seem to regard more the amount than the quality of the estate which the widow takes; such as the "whole wealth," "the entire share," and not merely enough for her subsistence. And it is to this distinction that the annotation on par. 7 relates. In that par. it is said that the widow should present her husband's funeral oblation, and obtain his "entire share." On which latter words

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it is noted, "In the commentary on *Jimuta Vahana*, which bears *Raghunandana's* designation, another reading of the text is noticed, viz., *Critsnam art'ham*, 'the entire estate,' instead of *Crits'nam ansan*, 'the entire share.' That reading is countenanced by the *Retnacara* and *Chintamani;* and if it be the genuine text, the whole of *Jimuta Vahana's* argument in the subsequent par. (to s. xiii.) falls to the ground. But the *Viramitrodaya* and *Smriti-Chandrika* agree with *Jimuta Vahana* in the reading of this passage," and this reading is again affirmed in par. 14. But I do not see how this observation on the difference between share and estate agrees with indiscriminate use of the latter word in par. 3, 4, and 6, preceding, and which declare that wealth signifies the whole estate; nor is it easy to reconcile that annotation in par. 14, asserting that the widow succeeds to the whole estate, and so *Jimuta Vahana* and the rest maintain.

The *Daya Bhaga* next takes up the distinction between the property, that is, the right of property, and the mere use. Thus ch. xi. sec. i. par. 9, "Nor should it be said that the intention of the text is to authorise the taking [or using] of the goods, [not to declare the right of property,] for the taking or using one's own property is a matter of course.

If there be any meaning in the words employed, it would seem that the 6th par. had in terms declared in reference to all which went before, that the widow's right must be affirmed to extend to her husband's whole estate, and not merely to wealth sufficient for her subsistence; and that par. 9 had in terms declared, in reference also to all the preceding paragraphs, that the next meant to declare the right of property in her, and not merely to authorise her taking, or using of the goods.

The difficulty lies in reconciling these positions (which are maintained by a variety of illustrations, setting aside or explaining contrarient authorities) with those which follow. Having summed up the whole doctrine as before stated, it is said in the 55th par., "Therefore the interpretation of the law is right as set forth by us." The author proceeds, par. 56, "But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it." Thus *Katyayana* says, "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

Different interpretations are given in the notes to the text, as here rendered, which is stated to be conformable with the usual reading, and the interpretation of it in the *Ratnacara*, concerning the mean of "abiding with her venerable protector, and enjoy with moderation." The text says, par 57, "Abiding with her venerable protector, that is, with her father-in-law, or other of her husband's family, let her enjoy her husband's estate during her life, and not, as with her separate, make a gift, mortgage, or sale of it at pleasure."

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This she cannot do in respect of immoveable though expressly given to her by her husband, c. iv. s. i. 23.

The doctrine is adopted and commented upon in *Jagannatha's Digest*, (3 *Dig.* 457–466.) But by that compiler it appears to have been carried further than is warranted by the passages of the *Retnacara* and the *Chintamani* referred to; and in pages 464, 465, an opinion is advanced, that though a widow is prohibited from conveying away immoveable property by her own voluntary act, and for purposes of her own, yet the donation may be valid. It must have been against this doctrine that *Mr Colebrooke*, in the letters referred to touching this subject, states, that "it appears upon inquiry and research not to have been sanctioned by any previous author of note, nor, as it is believed, by any writer whomsoever. It is, on the contrary, in opposition to the whole current of authorities, both in and out of Bengal." For such an observation as this could not have been applied by so learned a man to the doctrine laid down in the *Ratnacara* and the *Chintamani*, in respect to the widow's absolute interest in the personal and life estate in the real property of her deceased husband in those parts of the country, such as Tirhoot, where those books are received as the leading authorities, and which doctrine was expressly established by the *Sudder Dewanny Adawlut* in *Bhya Jha's* case in 1812.

Mr Colebrooke, in combating *Jagannatha's* illustration, "That the gift of an estate (which showed he was speaking of the real estate) by a widow should not be held void, while that made by a daughter, before whom she is a preferable heir, is valid," observes, that "according to *Jimuta Vahana's* doctrine, which extends the restrictions to daughters and mothers as well as to wives, the daughter is precluded from giving away an estate which comes to her from her father, and the mother one, which comes to her from her sons. It has actually been adjudged by the *Sudder Dewanny Adawlut* in the case of a mother. But when she dies, the daughters, or others who would regularly be heirs in default of the wife, take the estate, not the kinsman," &c.

The 58th par. of chap. xi. s. i. of the *Daya Bhaga* distinguishes between the heirs to the widow's separate property, such as her own brothers, and that property which is inherited by her from her husband, which descends to his heir after her decease, and concludes, "Consequently, heritage is not ranked with woman's peculiar property." Par. 59 declares, "Therefore, those persons who are exhibited in a passage above cited (sec. iv.) as the next heirs on failure of prior claimants shall, in the like manner as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after the use of it, on the demise of the widow, in whom the succession had vested," &c.

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These words are very remarkable, and, together with those which immediately precede, not only imply that the succession (the word used in every case of usual descent) to the estate vested in the wife, as heir to her husband in default of male issue, but that she might even dispose of part at least of it for lawful purposes for the next heir is to succeed, not to the estate generally, but to the residue of the estate remaining after the use of it.

By par. 56 and 57, she was enjoined to enjoy the property or estate during her life with moderation, not to make a gift, mortgage, or sale of it, at her pleasure—that is, as I understand it, a prohibition to dispose of the substance of the estate for other than lawful causes, conformably to her duty as a Hindoo widow; and this prohibition is more compendiously expressed in the 60th and 61st par.,—"Let not a woman on any account make waste of her husband's wealth;" when it is said the word "waste" intends expenditure not useful to the owner of the property.

Hence, as stated in par. 63, "if she is unable to subsist otherwise she is authorised to mortgage the property, or, if still unable, she may sell or otherwise alien it;" and so she may for the completion of her husband's funeral rites, and for other purposes enumerated in various passages.

That the widow should have the whole property of the husband, that is, the right of property, and not merely the use of the whole, or any aliquot part of it vested in her, and yet that she should be enjoined by law not to commit waste of it, is altogether a consistent proposition, and not unlike the estate of an incumbent in his church, his glebe, and tithes. Though the fee be in him, he can only enjoy for life as the widow is directed to do: he cannot for any purpose dispose of or encumber beyond his own period of enjoyment, as the Hindoo woman may her estate for some purposes. And if this, which is at least intelligible, be the Hindoo law of succession in respect of widows, it should seem to follow, that upon a proper case made out, the Court by some means or other would restrain the commission of waste; and thus far I can understand the doctrine, if it be such, of the *Daya Bhaga*.

But if several of the other injunctions contained in the same book are to be construed as rules of law restricting her use and enjoyment of the estate, apart from manifest waste of it, and not merely as religious or moral admonitions to her in such her use and enjoyment of it, then I find myself incapable of understanding or explaining the book, or of reconciling what appears to me its contradictory propositions. Thus in par. 60, after stating, "For women the heritage of their husbands is pronounced applicable to use." Par. 61 proceeds, "Even use should not be by wearing delicate apparel, and similar luxuries," &c. Again, in par. 64, citing *Narada*, "When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property,

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and care of herself, as well as in her maintenance, they have full power." Again, "In the disposal of property by gift or otherwise, she is subject to the control of her husband's family, after his decease, and in default of sons."

So far as relates to the widow's power of disposition over the husband's estate being under the control of his kindred, as her guardians, it is consistent with the prohibition against waste by her; and it is elsewhere stated, that except for necessary allowed purposes, she cannot give, mortgage, sell, or otherwise dispose of it without the consent of the kindred, or the next heir of the husband. But when it is further stated that they have full power, also, in the care of herself, as well as in her maintenance; and if it is to be inferred that they have also full power to regulate even her use of the heritage, in respect of forbidding her to wear delicate apparel, or to have similar luxuries, though she might command these without any waste of the estate: if these directions be not merely monitary, as I think they are, but rules of law, whereby her use and enjoyment of her husband's estate, without waste of it, are taken out of her own control and transferred with her person, under the full power of her husband's kindred, to regulate as they please; then it appears to me that this latter rule is in direct contradiction to the former rules of law to which I first referred, whereby the widow's right was affirmed to extend to her husband's whole estate or wealth, and his entire share, and not merely to wealth sufficient for her subsistence; and that the text meant to declare the right of property in her, and not merely authorise her taking or using the goods; and when both the near and distant kinsmen are warned not to become her adversaries, or injure her property, under peril of having the punishment of robbery inflicted upon them; and it is admitted that the possession of the property cannot be taken from her. For it would be vain and illusory to declare that she has the right of property in her, and not merely authority, to take or use the goods, and that that right of property extends over the whole estate, and not merely to a sufficiency for her subsistence, and that she alone has a right to possess it, when at the same time full power is given to another over the person to control her even in the use of it, and to confine her to a bare sufficiency for her subsistence, or, as par. 61 has it, "the use of the property sufficient for the preservation of her person is authorised."

In order, therefore, to avoid gross inconsistencies and contradictions, and yet to reconcile these doctrines with each other, I can find no better way than to consider her as having the entire right of property vested in her both in the moveable and immoveable estate; for there is no distinction between them taken in the books in respect to the husband's estate devolving upon her as heir, as there is in the case of male succession to ancestral property, and as there is also in respect of real property given to her by her husband in his lifetime, which she is declared incapable of alienat-

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ing from his heirs, as she may alien the personal property so given. But that she is legally prohibited from wasting the property so vested in her, and cannot make way with it, except for certain allowable and declared purposes, without the consent of her husband's next male heir; and further, considering that even in the use and enjoyment of the property so vested, she is religiously and morally enjoined to use moderation, and to take the advice of her husband's kindred in her manner of living, but is under no legal disability if she do not take or follow such advice; what may be considered as waste by a Hindoo widow, and what may be the proper remedy for it, are different questions, not necessary now to be entered into.

The third and only remaining question is, How far the decisions which have taken place in this Court have settled the point of law, that the widow of a Hindoo, dying intestate, and without male issue, is entitled to a life estate in the realty, and to an absolute estate in the personalty of a deceased husband devolving upon her?

It is not alleged that there was any decision on the point before the *Corformah's* case, which was decreed by this Court in Nov. 1812, the form of the decrees before that having been to decree to the widow the moveable and the immoveable property of her husband generally, without distinguishing between the two, or stating the quantity of the estate decreed in either; that was the first case in which the realty was decreed to the widow for life, and the personalty absolutely.

The complainants, *Issurchunder Corformah* and *Nairanee Dossee*, filed their bill for an account and partition against *Govinchund Corformah* and others, and in that case *Ramoney*, who was the widow of *Soorutchund*, was, upon the partition, decreed entitled to two shares, one in her own right as widow, and another as heir of her son, who had died after his father; and she was decreed a life estate in the realty, and an absolute estate in the personalty, as in the present decree. This decision is stated to have been made upon great consideration, after much argument, and in conformity with the opinion of the Court pundits; and at first sight it appears as if this Court had expressly adopted the doctrine of the *Ratnacara* and *Chintamani* as applicable directly to Bengal; or, admitting that the authority of those books yielding to the *Daya Bhaga* in Bengal, that the *Daya Bhaga* did not contradict them in this respect, but was capable of, and did then receive, a construction consistent with those older authorities; if the decision had appeared to me to have been so grounded, I should certainly have yielded my impression of the true construction of the *Daya Bhaga* to such an authority. But the distinction which has been taken, that that was a case of partition, and not of simple succession, supported as that distinction is by the opinion of our own pundits, which would reconcile that decree with the opinion of *Mr Cole-*

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brooke, and with the opinion of the *Sudder Dewanny Pundits* upon the doctrine of the widow's succession, has induced me, after much hesitation and anxious investigation, to conclude that the court decided the *Corformah's* case upon the ground of the law of partition, and not of simple succession. One of the two pundits who advised the Court in that case is still in his office, and to questions put to them upon this point they have both answered thus:

6th Ques.—Is there any difference in the quantity of interest which a woman takes in property by partition with sons, and that which she takes by the death of her husband without issue?

They first answered, "There is no difference in the interest so taken." But they immediately afterwards corrected themselves, and stated thus:—

Ans.—"There are different opinions on this subject. Some pundits affirm that property obtained by a woman sharing with her sons is to be considered as *stridhana*, separate female property as her own, over which she has perfect uncontrolled authority. There are opinions both ways. We are of opinion that the most eligible mode would be to consider it *stridhana*, it being more in the nature of a gift than what she succeeds to in her own right."

7th Ques.—Does this answer apply equally to moveable and immoveable property?

They first answered, "It applies equally to both moveable and immoveable property." But they added, "Fixed property given by a husband to a wife is not alienable by her." Now, if the estate which a woman receives on partition, either as a widow or a mother, is to be considered as in the nature of *stridhana*, it has already been shown that she takes it absolutely, but cannot alien the real estate, though given to her by her husband in his lifetime, but that after her death it shall go to his heirs; *à fortiori*, therefore she could not alien his real property, which simply devolved upon her at his death.

In the *Daya Bhaga*, c. ii. 46, it is said, speaking of partition, "The mother shall take an equal share with her sons if her husband be deceased." And again, in c. iii. s. ii. 29, "When partition is made by brothers of the whole blood, an equal share must be given to the mother. For the text expresses the mother should be made an equal sharer." This is afterwards explained in case no separate property has been given to her, for then she takes only half a share. This would seem to imply that she takes her share absolutely, otherwise it would not be an equal share, nor would she be an equal sharer with her sons. But the *Corformah's* case has decided that the estate, which both a widow and a mother takes in the property of her husband on partition, follows the rule which is expressly given by the *Daya Bhaga* as to *stridhana*, namely, that she takes the personalty absolutely, but the realty only for life, and that, it has been shown, is more nearly conformable to the estate which the husband or son took in the ancestral property. The decision

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of the *Sudder Dewanny Adawlut*, in *Bhya Jha's* case, took place very recently before the decision of this Court in the *Corformah's* case; and it is not improbable that the recollection of the two decisions (by both of which the personalty was given to the widow absolutely and the realty for life only) might be blended together so as to leave an impression upon the minds of those who heard of them at that time, that the doctrine of the *Ratnacara* and the *Chintamani* was applied generally to Bengal. But when it is now ascertained that the one decision was made in respect of lands in Tirhoot, where those books give the rule; and that the other was made in the case of partition, when the *Daya Bhaga* gives the same result, though by a different rule; the authority of the *Corformah's* case will stand, though it does not conclude the present, and the various conclusions in the different cases will not be inconsistent, nor the doctrine of the two Courts contradictory.

The next case, that of *Seebchunder Bose* v. *Goorоopersaud Bose* and others, decreed finally on the 7th August 1813,* was also a case of partition, and is therefore capable of receiving the same answer. To the other two cases which here occurred, the one of *Sreemutty Juggomohamey Dossee*, widow of *Mudunmohum Gupto* v. *Ramhun Gupto*, decreed on the 23d June 1814, and the other of *Jupada Raur* v. *Juggernaut Thakoor*, decreed on the 7th Feb. 1816, the same answer cannot be given. But those cases passed without argument at the bar, though not without notice, upon a full understanding that the point has been before expressly decided by this Court, upon the misunderstanding, as it now appears, of the *Corformah's* case, or the misblending and misrecollection of that with *Bhya Jha's* case. This impression of the law was so strange that it was admitted in the former case, even by those who were interested against it; and the only points made against the widow were to question the valid completion of the marriage, or if valid, that she had forfeited her estate by refusing to join herself to, or live with, her husband's family after his death; both which objections were overruled upon the opinion of the pundits. In the last of the two cases the decree was taken as a matter of course upon the supposed conclusiveness of the former decisions.

The result of the whole is this, that unless the authority of the *Ratnacara* and *Chintamani* are to give the rule on the point in judgment in Bengal, the decree in its present form is erroneous: and it appears by the general opinion of the pundits of the *Sudder Dewanny Adawlut*, and of our own, supported by the authority of *Mr Colebrooke*, and in effect by the decisions in the *Sudder Dewanny Adawlut* in *Bhya Jha's* case, and other cases, when the doctrine of those books has been applied to cases, on the specific ground of their arising in Tirhoot, that the same doctrine does not apply to Bengal, being in opposition to the doctrine of the *Daya Bhaga*,

* See *Macn. Cons. H. L.* 69.

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which is the ruling authority in this province. And it seems that, by the *Daya Bhaga,* no distinction is taken between the realty and personalty as to the *quantum* of the widow's estate; but the whole appears to be given to her absolutely for some purposes, though restricted in her disposition as to others, and therefore she takes more than a life estate in the realty for these allowed purposes, and less than an absolute estate in the personalty for other and different purposes; and if this be so the decree cannot be supported in its present form. But at present it is sufficient to overrule the demurrer without specifying the particular form in which the decree may ultimately be drawn up.*

Note by Sir E. H. East.—There was an appeal against this decree; and soon after it was pronounced an application was made to the Court to direct the payment over to the widow of the whole of the personal estate in the hands of the master, together with the accumulation of interest.

This, however, was opposed on Saturday, 14th August 1819, by *Spankie, A. G.*, and *East,* for the next male heir, Cossenaut Bysach; and by *Money* and *Lewin* for Comulmoney, and supported by *Ferguson* and *Crompton.*

The Court, after ineffectual endeavours to adjust matters equitably between the parties, made an order for the payment to her of the interest accumulated, which they thought not more than adequate to her just allowance for her rank and fortune, (supposing she was not also entitled of right to the actual possession of the principal also, which it was thought as well to retain during the appeal;) and also to give liberty to her counsel to apply for the possession of the principal sum to a Judge in Chambers after the decree signed. But ultimately the principal sum was retained on account of the appeal yet, *quære* certain costs were paid out of it.

STRIDHANA—NO RESTRICTIONS ON ALIENATION, EXCEPT LAND, THE GIFT OF HUSBAND.—Land, or any other property, may be possessed by a woman as *stridhana, Mitac.* ch. i. s. ii. § 1–3; and the law with respect to that kind of property (except perhaps land, the gift of her husband) is, that a widow is not subject to the restrictions against alienation which apply to property that she succeeds to upon her husband's death.

According to the Bengal school of law, it seems clear that, whether as wife or widow, a woman has an absolute power of alienation over her stridhana, with the exception of *immoveable* property bestowed upon her by her husband, see *Daya Bhaga,* ch. iv. s. i. § 21–23. But, as is observed by *Mr Sutherland,* in his remarks at p. 430 of the 2d vol. of *Sir Thomas Strange's* work

* The decree was, that the several decrees of the 5th Dec. 1814, and the 8th April 1816, should be rectified, and that the said *H. Dossee* should be declared entitled to the real and personal estate of her husband, to be possessed, used, and enjoyed by her as a widow of a Hindoo husband dying without issue, in the manner prescribed by the Hindoo law.

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on Hindoo law : "The *Mitacshara* is wholly silent on the power of women to alienate their peculiar property, though explicit in disavowing all authority in the husband to appropriate the same." And the language used by *Sir Thomas Strange*, in the 1st vol. of his work, p. 247, as well as in the remark of *Mr Sutherland*, p. 21 of the same work, when looked at alone tend to raise a doubt whether, according to the Benares school of law, there is not a general restriction against alienation by a wife or a widow of immoveable property held by her under whatever title; when, however, we find it stated in the same work, and by numerous other authorities in broad and general terms, that a woman's stridhana is her absolute property, at her independent disposal, (with perhaps the exception of land, the gift of her husband,) and there being no ground that we can see for any distinction in this respect between moveable and immoveable property held by a woman, we are of opinion that the Hindoo law recognises the power of alienation to the extent we have laid down, *Scotland, C. J.*, in *Doe* v. *Kullamal* v. *Kuppu Pillai*, 1 *Mad. H. C. R.* 85, referring to *Stra. H. L.* 27, 28, 247, 248 ; *ib.*, 19, 21, 402, 407 ; *Macnaughton's Prins. H, L.* 43, 44, 136 ; and *Coleb. on Contracts*, p. 28.

SAUDAIYACA.—With regard to the capability of a Hindoo widow to alienate her *saudaiyaca*,* *i.e.*, the property given her by her kindred, or husband before, or after her marriage, the following texts may be quoted, and which are collected by the late learned editor of the *Madras H. C. Reports*, *Mr W. Stokes*, vol. i. p. 90.

KATYAYANA.†—What a woman, either after marriage or before it, either in the mansion of her husband or of her father, receives from her lord or her parents, is called "a gift from affectionate kindred."

And such a gift having by them been presented through kindness, that the women possessing it may live well is declared by law to be their absolute property.

"The absolute exclusive dominion of women over such a gift is

* *Mr Strange*, in the first edition of his *Manual*, § 147, observes: In that which constitutes woman's property, a distinction obtains of what has been given to the woman, whether it be immoveable or moveable, by her father, mother, or brothers ; this is termed *savdaiyaca* ; over such she has exclusive control, without regard to her husband or heirs, *Mitac.* chap. ii. s. xi. § 5 ; *Saraswatee Vilasa Vegavahara Mayukha*, ch. iv., vii. s. i. § 8 ; *Vide* also § 147, 2d edit. But it would appear that in holding dealings with regard to her *saudaiyaca*, the wife must, however, act through her husband, and she is bound to fulfil his wishes, she being empowered to dispose of this species of property at will, *Smriti Chandrika*, and *Saraswatee Vilasa*, *Stra. Man.* 2d edit. § 165, 166.

† Unless *Katyayana* contradicts himself, we must hold that the words, "*the estate*," in the following text refer solely to the property which a widow inherits as such. "The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the whole estate until she die, and after her the legal heir shall take it, 3 *Dig* 576; *Vide tamen Jagannatha Comment.*, *ib.* 575–577."

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perpetually celebrated, and they have power to sell or give it away as they please, even though it consists of lands and houses. 3 *Coleb. Dig.* 573, 574. The last clause is thus rendered in the *Daya Krama Sangraha*, ch. ii. s. ii. § 26. The power of woman, *lege*, women over the gifts of their affectionate kindred is ever celebrated both in respect of donation and of sale, according to their pleasure, even in the case of immoveables. So also in the *Daya Bhaga*, ch. iv. s. i. § 21, and the *Vyavahara Mayukha*, ch. iv. s. x. § 8."

"Texts restricting the power of a widow to alienate immoveables given to her by her husband are these :—*Narada*—Property given to her by her husband, through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or houses, 3 *Dig.* 575."

Vishnu, (or *Narada*,)—What has been given by an affectionate husband to his wife she may consume as she pleases when he is dead, or may give it away, excepting immoveable property, *Mitac.* ch. i. s. i. § 20.

The Ratnakara. A woman has absolute exclusive dominion over such gifts (scil. gifts to her separate use) consisting of lands and houses, except such immoveables as her husband gave her, 3 *Dig.* 575.

The Daya Krama Sangraha, ch. ii. s. ii. § 31, "Even in the case of immoveables," relates to immoveable property, other than that which has been bestowed upon her by her husband; for a prohibition exists against the gift or sale by a woman in regard to immoveable property given to her by her husband, so *Narada* what has been given to her, &c., *ut supra.*

The Daya Bhaga, ch. iv. s. i. § 23. But in the case of immoveables bestowed upon her by her husband, a woman has no power of alienation by gift or the like, so *Narada* declares. What has been given, &c., *ut supra.* It follows, from the specific mention of "given by a husband," that any other immoveable property, except such as has been given to her by him may be alienated by her, else (if this text forbid donation in the case of immoveables in general,) *Sri Krishna*, what the preceding passage concerning the power of women in respect of donation and of sale, "according to their pleasure, even in the case of immoveables, would be contradicted."

The Vyavahara Mayukha, ch. iv. s. x. § 9. "But over immoveable property given them by their husbands they do not possess full power from this text of *Narada*. What has been given, &c., *ut supra.**

WILL—SAUDAIYACA STRIDHANA—SECOND MARRIAGE, RIGHT OF WIFE TO SUE FOR FEE ON SECOND MARRIAGE.—K., a Hindoo, (defend-

* *Vide*, also *Vivada Chintamani*, p. 260, 261, "Consequently a woman can dispose of moveable property which has been given her by her husband, but she can never dispose of immoveable property. The same rule holds good in the case of Saudaiyaca, or the gifts of affectionate kindred," p. 261.

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ant,) married G., the lessor of the plaintiffs, a Hindoo woman, and had many sons and daughters by her. All the sons died before 1193 B.S., but some of the daughters were living. In that year K., for the purpose of having male issue, married J., without marriage portion, except a small present from her father of clothes, ornaments, and furniture. About this marriage G. quarrelled with her husband, and in order to pacify her K. signed a paper, whereby he gave her, amongst other things, three dwelling-houses and a half, and a garden, without saying for life, or for ever. One of these houses descended to K. from his father; he purchased the rest. K. was in possession of two other houses. J. had no child; but G. has borne children to K. since the execution of the paper, and one child since process was commenced against her husband. G. never had possession of the property conveyed to her, but she continued to live in one of the houses, as she had many years before, and she now sought to recover possession of the other three and a half.

The following questions were put to the pundits:—

1st, Does a gift made by a husband to a wife in such a manner, and on such an occasion as stated above, give the wife a right to sue her husband for the property given?

2d, Is such a gift to be understood as a gift for life only, or has the wife a right to sell the houses in her lifetime, or to devise them at her death?

The first pundit answered the first question—Whatever property a man who has married two wives has given to his first wife by means of a paper witnessed, in order to satisfy her in all respects, such property is the property of the wife. In order to recover such property the wife may sue the husband, according to what *Shastra* directs, in like manner as for a debt, he cites *Yajnavalchya*, *Daya Bhaga*, ch. iv. s. i. § 13, That which father, mother, or husband has given is called "gotten near the fire," and it is also called "the property of females." *Katyayana*, 2; *Daya Bhaga*, ch. iv. s. i. § 24. "Neither a husband, nor yet a son, nor a father, nor brothers have a right to appropriate stridhana, *i.e.*, the property of females; and if any one of those shall possess himself of such property by force, he must be made to return it with interest, and must be well chastised." In the *Daya Tatwa*, where it treats of property of females, such property is termed *saudaiyaca stridhana*. That which is obtained from a husband, or from parents, I reckon to be *saudaiyaca stridhana*, *i.e.*, given her for a good purpose; and when a woman obtains *saudaiyaca stridhana* it implies that she has the power of disposing of it.

Answer to the second question—The property of females, given as stated in the second question, is theirs as long as they live. A woman has power over this kind of property to sell it, and if it be not immoveable property, she has also the power of disposing of it at her death; and whatever immoveable property so remains after her death will descend to the lawful heirs in succession—that is to

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say, her children, husband, father, mother, &c. He cited the following authorities: *Katyayana* says—Whatever property the husband has given to the wife, let her keep it in his absence in any manner she pleases. If he be present, let her take care of it; if not, let her deliver it to some of his relations. Let the wife dispose of the property given to her by her husband in any manner she pleases when the husband dies, but while he is alive let her keep it, *Daya Bhaga*, ch. iv. s. i. § 8, 9. So *Narada*,—Whatever the husband, of his own pleasure, has given to the wife, let the wife, when he dies, expend or give away as she pleases, excepting only the immoveable property, *Daya Bhaga*, *ib.* § 23. So *Devala*,—The property of the wife is to be divided equally after her death to sons and daughters. But if she be without children, let her husband take it, or else her mother, or her brother, or even her father. But see this passage as translated in the *Daya Bhaga*, ch. iv. s. ii. § 6.

The second pundit replied to the first question—It does. Whatever property the man who has married two wives has given to the first, that property is stridhana. Neither husband, father, son, nor brother have any power to seize such property, or to give it away in charity. If any of these persons shall possess himself of this property by force, the magistrate shall cause him to restore it with interest, and shall chastise him, on a complaint being made. *Jim. Vahana* has determined this according to the *Shastra*.

To the second question—As long as she lives, the wife has a right to sell the stridhana given her by her husband, unless it be immoveable property, and at her death she may also devise it, if it be not immoveable property. A woman can only have the use and occupation of immoveable property, and afterwards it will descend to the heirs of *stridhana*, or female property, *G.* v. *K.* 2 *Morl. Dig.* 234.

If a legacy be given to her by the relations of her husband, or by her own, it is stridhana, and her husband has no right to it; but if given by a stranger, she cannot part with her interest in it without her husband's consent, *Ramdulol Sircar* v. *Sreemutty Joymoney Dabey*, 2 *Morl. Dig.* 65.

Rampersaud Mahotty, a Hindoo, was (12th Feb. 1816) married to Heera Raur, about forty years ago, and died about thirty-two years ago, leaving Heera, his widow, and two sons and a daughter, him surviving, and certain landed and personal property. The daughter died in infancy. Paunchoo, the younger son, having first married Jushadah, died at the age of thirteen, in 1198 B.S., about twenty-two years before, without issue. Bulram, the eldest son, also died about twelve years before, leaving neither widow nor issue; and, last of all, Heera Raur, the widow of Rampersaud, died in 1813 very old, having first made a will, by which she assumed to dispose of the whole property which had been possessed by her hus-

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band, or acquired by herself after his death out of the rents and profits of the family estate, and of part of which her devisee, the defendant, possessed himself.

On a bill filed for discovery and account, and of the title-deeds, and their delivery up, and also of the will for cancellation, the opinion of the pundits was taken, and delivered to this purpose :—On Rampersaud's death, the family property descended to his two sons, *Bulram* and *Paunchoo;* Heera Raur, the widow, being entitled to her maintenance.

On Paunchoo's death, his moiety of the real estate went to the complainant, his widow, for her life, with remainder to his brother Bulram, in fee.

On Bulram's death, without widow or issue, Heera Raur, his mother, became his heir, both of the realty and personalty, and on her death, the realty, and so much of the personalty (it having devolved upon her as her husband's property) * as was not disposed of by her in her lifetime, goes to the king, and she cannot will it away to a stranger, (which the defendant was.)

A widow, they said, may in her lifetime *give* away personal property which had devolved to her from her husband; but she cannot will it away.

The Court decreed, that one moiety only of the real and personal property of Rampersaud, the father—which moiety had descended to Paunchoo, his younger son, the husband of the complainant—should belong to her, (the other moiety being in the Crown,) and that the will of Heera Raur, affecting to dispose of her husband's family property to the defendant should be delivered up to be cancelled, *Jushadah Raur* v. *Juggernaut Tagore;* 2 *Morl. Dig.* 67.

WILL—EXCLUDING ONE OF FOUR SONS FROM THE FAMILY ESTATE.—Desherel died, leaving four sons—viz., R., L., B., and S. D. inherited from his father a small piece of ground, on which he built a house, of that house and ground he gave one half to B., and put his eldest son R. into some employment, who left the family, and makes no claim on his father's estate. To the other three sons, who continued to live with him, and who did business for him as well as on their own accounts, he gave considerable sums of money, and at his death L. was worth more than B. and S. Since the death of D., a will written by himself, and properly attested, had been found, giving the whole of his property to B. and S., only requiring them to pay 1000 Rs. to his wife, appointing them attornies but making no mention of L., who is deaf. The following questions were submitted :—

1. Whether, by Hindu law, such will be valid, so as to exclude L. from any share of his father's property ?

* If a mother succeeds her son as his heir in default of successors nearer in degree, she succeeds to *his* property and not to *her* husband's, *vide* Inheritance.

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2. Supposing it not to operate to his exclusion from a share of the property, yet whether it be so far valid as to give to B. and S. the exclusive management of that property?

Answer of the first pundit:—1st question, What the father has written is valid, according to the Shastra.

2d question.—The father not having appointed any other son to manage his own acquired property, his appointment of the third and fourth son is valid, according to the Shastra. It will have full force.

Answer of the second pundit:—The father having excluded his second son L. from his father's estate, has given whatever property he had to his third and fourth sons. The paper expressing this is valid, according to the Shastra. In this same estate, these two very persons are the masters, nor can another son overset this.

Answer to the 2d question:—Although the father had not excluded his son L. from the paternal estate, and had yet by a writing appointed B. and S. to be the managers of it, that writing would be valid according to the Shastra. *Desherel's* case. Note by *Sir E. H. East; 2 Morl. Dig.* 220.

Shrotriyam conferred for life—Each holder can only alienate his own interest.—Each holder of a Shrotriyam conferred for life can only alienate his own life interest. *Sundaramurti Mudali* v. *Vallinayakki Ammal*, 1 *Mad. H. C. R.* 465.

The suit was brought by the respondent as widow and heir of Kumarasvami Mudali to recover four Shrotriyam villages. The Shrotriyam had been granted to one Tenappa Mudali for three lives, including his own. He died without issue, but adopted a son, Kumarasvami Mudali, who succeeded as the second life. Kumarasvami also died without issue, but was survived by Sundaramurti Mudali, the appellant, a son of his natural born sister. Kumarasvami wished Sundaramurti to be his heir, but no adoption of the latter by the former had, or could have taken place. Kumarasvami devised the Shrotriyam to Sundaramurti Sami, and the question was whether this devise was valid as against the claim of Kumarasvami's widow and heir, the respondent, the Courts below decided in her favour.

It was contended for the appellant (the defendant) that the Shrotriyam was alienable, and passed under Kumarasvami's will, whilst for the respondent (the plaintiff) it was submitted that a Shrotriyam holding was in the nature of a tenancy in tail, and inalienable beyond the lifetime of the actual holder.

Scotland, C. J. The first question is, What is the nature of the Shrotriyam tenure? Originally a Shrotriyam appears to be an assignment to a Shrotriya or Brahmin well read in the Vedas. But now it has got the wider signification of a grant by government to a private person, in consideration of service rendered by himself, or a member of his family, of a portion of the land revenue, or of a village, or land either in perpetuity, or for a limited num-

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ber of lives at a moderate rent, on failure to pay which, it is liable to resumption or forfeiture. . . . . It must be taken, I think, that the grant was to the original grantee and heirs.* Then as to the authorities bearing upon the question of the alienability of Shrotriyams, two cases have been referred to. One, *S. A.* No. 6 of 1860, *Mad. S. D.* p. 173, does not apply to Shrotriyams. The order of the Revenue Board merely goes to show that in all cases the enjoyment of the land granted is considered as strictly limited by the terms of the grant, and that the Shrotriyam holding is regarded as of the nature of a strict entail, and inalienable by the donee. *S. A.* No. 29 of 1848, *Mad. S. D.* 1849, p. 51, was undoubtedly a case on a Shrotriyam, and there it was held that the original holder could not charge the Shrotriyam for the maintenance of the plaintiff's ancestor, and that such charge was invalid, even though the grant had been renewed by the succeeding inheritors. This is a strong authority to show that the Shrotriyam holder has no absolute control over the Shrotriyam such as is contended for by *Mr Mayne.*

These authorities go to support *Mr Norton's* contention, assuming this to be a Shrotriyam grant made in consideration of personal service. *Reg.* iv. of 1831 applies strongly against any right of alienation. It recites, "Whereas it is just and expedient that personal, or hereditary grants of money, or of land revenue conferred by the Government, in consideration of services rendered to the State, should be strictly applied to the purpose for which they have been granted, and should not be liable to be diverted from that purpose to the use or benefit of persons who have no claim upon the State. . . . . The Courts of Adawlut are hereby prohibited from taking cognisance of any claim to hereditary, or personal grants of money, or of land revenue, however denominated, conferred by the authority of the Governor in Council in consideration of services rendered to the State, unless the plaint is accompanied by an order signed by the chief or other secretary to Government referring the complaining party to seek redress in these courts." This regulation applies to all Shrotriyams, and they are clearly recognised and treated as strictly settled, and not capable of being diverted from the purpose for which the grant was made. The Government, as donor of the original grant, is considered to have a continuing interest in the grant which may at some time revert, like the reversion in the donor of an estate in life, or of an estate in tail, on failure of issue of the grantee. Then the provision which follows, that "the power to decide on such claims is reserved exclusively to the Governor in Council," is quite inconsistent with the notion that there are independent rights under the grants in question which the grantees may at any

* This is a matter of evidence to be proved by the grant itself. The inference does not necessarily follow.

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time alienate absolutely. Then sec. 3 provides, that "the grants referred to in the previous section shall not be liable to attachment, or sequestration in satisfaction of any decree or order of court;" and the rest of the section, "save and except for the discharge of debts or obligations personally incurred by the holders of them," is repealed by Act xxiii. of 1838. Nothing, as it seems to me, could more distinctly show that the legislature understood that, legally, grantees of Shrotriyam land could not dispose of them. The regulation is intended to guard against the diversion of the proceeds of lands comprised in such grants even during the lifetime of the donee. *Mr Mayne* contends that this does not amount to a prohibition of the right to alienate. But when I read the regulation and the Act together, and consider how unreasonable it would be to protect against creditors the proceeds of property which the debtor had a right to dispose of, it seems impossible to avoid the conclusion that the regulation clearly recognises the law to be that a Shrotriyam is inalienable by the holder.

The right of an adopted son to succeed to a Shrotriyam was recognised by the Court of Directors, 30th May 1843; *C. O. B. R. I.* 406, and by Government; *ib. I.* 407, 408; so the right of a widow to succeed to a Shrotriyam during life has been recognised, *Ex. Min. Cons.* 14th August 1847; *ib. I.* 281; *Sloan's Jud. and Land Revenue Code, I.* 559; see 1 *Stra. H. L.* 209; 2 *ib.* 365, 366.* See Index Shrotriyam.

SUNNUD, OR MAINTENANCE-DEED—CONSTRUCTION OF, FROM GENERATION TO GENERATION—SUBJECT TO ALLOWANCE FOR CERTAIN CLASSES OF THE FAMILY.—The zemindar in possession by a sunnud, conveyed to A., as the head of a branch of the granter's family an estate, part of the zemindari in lieu of maintenance, to which A. was entitled out of the zemindary "to hold and enjoy possession from generation to generation," subject to an allowance for maintenance to a certain class of the family described as Lowahokans and Matalokam's descendants, and relations. A.'s heirs afterwards alienated a part of the estate for a valuable consideration, held, first, In the absence of evidence of any class of persons answering the description of Lowahokans and Metalokams, (which might have created a trust,) A. took an absolute estate in the lands assigned to him.

2dly, That the limitation in the sunnud, "from generation to generation," did not create such an estate as to operate as a bar to alienation by sale, *Rajah Nursing Deb* v. *Roy Koylasnath*, 9 *Moore's In. Ap.* 55. See *post*, Will.

TORAS GARAS.—Toras garas, an annual fixed money payment in nature of black mail, is alienable, and subject to sale or mortgage like other property, *Sumbhoolall Girdhurlall* v. *The Collector of Surat*, 8 *Moore's In. Ap.* 1.

* This subject is not connected with Hindoo law, but has been noticed here as connected with property.

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ZEMINDAR CANNOT ALIENATE HIS ZEMINDARI.—A zemindar has no more power to charge a perpetual annuity in favour of a stranger on the income of the zemindari than he has to alienate the corpus, *Narayana Devu* v. *Hirischendana Devu*, 1 *Mad. H. C. R.* 455; see *S. A.* No. 15 *of* 1862; *ib.* 141; *S. A.* No. 114 *of* 1862; *ib.* 349; *Anund Lall Sing Deo* v. *Maharaj Dheraj Gurrood Narayun Deo*, 5 *Moore's In. Ap.* 82; *Chetty Colum Comara Vencatachella Reddyer* v. *Rajah Rungasawmy Streemuth Tyengar Bahadoor*, 8 *Moore's In. Ap.* 319.

ZEMINDAR'S ESTATE AND POWERS TO ENCUMBER AND ALIENATE.—A zemindar's estate is analogous to an estate in tail as it originally stood upon the statute *de donis*.

A zemindar is the owner of the zemindari, but can neither encumber nor alienate beyond the period of his own life. *Chintalapati Chinna Simhadriraj* v. *The Zemindar of Vizianagram*, 2 *Mad. H. C. R.* 128.

The question is, Whether or not this zemindar took the steps which Regulation xxv. of 1802 renders necessary to effectuate an alienation of the zemindari.

Per Curiam.—The vakeel for the appellant quoted numerous cases, all disallowing the right of any zemindar under the permanent settlement to alienate for any period beyond his own life; but sought to distinguish them on the ground that this was a grant for a valuable consideration. Independently of the fact that several grants set aside by these cases were on account of marriage, which is a valuable, not merely a good, consideration. The *ratio decidendi* of all the cases down to the two latest in 1 *Mad H. C. R.* 148, 455, clearly is, that the zemindar has really an estate analogous to an estate tail as it originally stood upon the statute *de donis*. He is the owner, but can neither encumber, nor alienate beyond the period of his own life. If he had sold, the sale would be inoperative beyond his life, and would amount merely to an alienation of his life interest.

The case *Syed Ali Saib* v. *Sri Raja Sanyasiraj*, 3 *Mad. H. C. R.*, is based upon the construction of s. 8, Reg. xxv. of 1802, and the decision follows implicitly an *obiter dictum* laid down by the late *Sudr. Court* in suit No. 6 of 1821; 1 *Sel. Dec.* 284, to the effect, that "with respect to alienations made without the consent of Government, it has been ruled that the clear and obvious intent of the restriction in this section is to defeat improper alienations to the prejudice of the rights of Government, or of the successor to the estate; and that such alienations are voidable on the determination of the interest of the person who makes them." The question was again brought before the High Court as to whethor this *obiter dictum*, which had been followed up to the year 1865, was based on a sound construction of the regulation, or whether the regulation did not rather intend, that any restriction placed upon alienation was intended to operate only as between the Government and the zemindar, and not as between the

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zemindar and his grantee. *Lord Kingsdown*, in delivering judgment in the *Yettia* poor case, 8 *Moore's In. Ap.* 337, observed, with reference to this regulation and the power of alienation possessed by a zemindar, "that the language of the regulation would seem to apply to questions between the zemindar and the Government, and to have been formed with a view of preventing a severance of the zemindari without public notice to the Government. It is not very obvious upon what principle it can be held that an instrument, good against the party making it, is bad against an heir if the ancestor had an absolute power of of alienation."

Mr Justice Holloway, in pronouncing judgment, said, That on further consideration, and on examination of all the cases, and regulations bearing on the subject, he was led to concur in the correctness of the observation of *Lord Kingsdown*, which, however, is simply an *obiter dictum*. Had it been otherwise, the High Court would have been bound to regard it implicitly as paramount authority. The majority of the Court having, however, agreed in upholding the *obiter dictum* of the late *Sudr. Court*, the law, with respect to the power of alienation possessed by zemindars, where the formalities required by the regulations have not been complied with, must be taken to be that such alienation, even for a valuable consideration, holds good for the life of the zemindar alienating, but is not binding on his heirs. We are of opinion that the view taken by *Mr Justice Holloway* is the correct one, and as the subject is of importance, have no doubt that it will be upheld if appealed to the privy council.*

ALIENABILITY OF SHARE OF UNDIVIDED FAMILY PROPERTY—PARTITION.—By the Hindoo law, as applied in Madras, a member of an undivided family may alienate the share of the family property to which, if a division took place, he would be individually entitled. *Virasami Gramini* v. *Ayyasvami Gramini*, 1 *Mad. H. C. R.* 471.

THE VALIDITY OF A SALE OF SUCH SHARE UNDER A FI. FA —There may be a valid sale of such share under an execution in an action for damages for a tort, *ib.*

In this case the plaintiff brought the suit to recover possession of two houses and lands in Madras, which he had purchased at a sale by the sheriff under a *fi. fa* issued to recover certain damages awarded against the defendants, Ayyasvami Gramini and others, and the question raised was whether the plaintiff acquired any, and what interest in the property, which belonged to an undivided family of which the defendants were members, by virtue of such sale.

For the defendants it was contended, as matter of law, that the sale by the sheriff passed no interest whatever in the family property, for that, even if it had been an alienation by Ayyasvam

* We have inserted this decision as bearing on a subject incidental to property, though not strictly connected with Hindoo law.

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himself, without the consent of his co-parceners, such alienation would have been void, and inoperative even to the extent of his own share, and this must *à fortiori* be so, when the sale is made under an execution in an action of tort for damages.

Scotland, Chief-Justice, in delivering judgment said, We are of opinion that Ayyasvami might have made a valid alienation of his share and interest in the property, and that it passed under the sale by the sheriff. As regards the supposed distinction where, as in the present case, the execution is for damages for a tort, we think that the damages and costs recovered constitute a judgment debt, and the right of the execution creditor thereunder is the same as upon any other judgment for the payment of money. To hold differently in this case would be in effect to declare the pecuniary immunity of all members of undivided Hindoo families not possessing self-acquired property for any wrong, however great, which they may commit.

Mr Mayne, however, mainly relied upon the general ground that no alienation of a divided Hindoo family without the consent of the co-parceners, can bind even his own share, and he asked our consideration of several decisions of the late *Supreme Court* upon the subject. It was not disputed that the course of decision in the late Supreme Court since at least the case of *Ramasawmy* v. *Sashachella*, 2 *Stra. Notes of Cases*, 1827, p. 74, and the opinion expressed by *Mr Colebrooke* in his observations upon that case,* supported the validity of such an alienation to the extent of the alienor's own share, nor that the same rule of law prevails in Bengal. But it was said that there is a foundation for the rule in

* On the subject of the question you had lately before you, I entirely agree with you, that the mortgage (sale or gift) by one of several joint owners, without consent of the rest is invalid for others' shares. In Bengal law, it is clear that it is good for his own share, and for his only. In the other provinces, it is as clear that the act is invalid, as it concerns others' shares. The only doubt which the subtlety of Hindoo reasoning might raise, would be, whether it be maintainable even for his own share, of undivided property. On the two first points, then, as stated by you, the law is undoubtedly, as you have viewed it. On the third point, I take the law to be, that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor, and that an unauthorised alienation by one of the sharers is invalid, beyond the alienor's share, as against the alienee's. But consent is implied, and may be presumed in many cases, and under a variety of circumstances, especially where the management of the joint property, entrusted to the part owner, who disposes of it, did suppose a power of disposal or, where he was the only ostensible and avowed owner, and generally, when the acts, or even the silence of the other sharers have given him a credit, and the alienee had not notice. See *Comarah Pellay* v. *Permal Pellay*.

I cannot refer you to authorities beyond the passages to which you have already adverted for this position. I rather consider it to be a point of evidence what shall suffice to raise the presumption of consent or acquiescence, than a matter on which the Hindoo law has pronounced specifically, and I do not recollect any passage more express than those to which you have referred showing that the alienation is invalid as against the alienee. The case of *Prannath* v. *Calishunker*, *S. A. Bengal*, before 1805, p. 49, 51, was decided, I conceive, on the ground of implied consent.

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Bengal, which does not exist according to the Hindoo law applicable to Madras; for that, in Bengal, the share of each parcener is treated as separate, even before partition, though unascertained; and the *Daya Bhaga*, ch. ii. s. 31, was referred to, but that section appears to be a quotation from *Narada;* and, according to *Mr Colebrooke's* note to the passage, it is otherwise interpreted by different compilers, and is generally understood as declaring the separate and independent right of co-heirs who have made a partition; and certainly the language of the passage itself refers to a condition of separation to some extent. But we do find in ch. ii. s. 1, § 26, on the widow's right of succession, that the author, in the course of a discussion upon the contradictory statements of text writers and commentators, makes the observation, that "it is not true that, in the instance of reunion [and of a subsisting coparcenery] what belongs to one appertains also to the other parcener; but the property is referred severally to unascertained portions of the aggregate. Both parceners have not a proprietary right to the whole." This observation, however, is used only in reply to the argument that the preferable right of the surviving parceners may be deduced by inference, from the fact that "the same goods which appertain to one brother belong to another likewise," and "that when the right of one ceases by his demise, those goods belong exclusively to the survivor, since his ownership is not divested." But, according to both schools of Hindoo law, the right of survivorship is not absolute, and the undivided share, according to both, descends to his sons; and it seems to us that the real ground upon which the widow's right of succession is placed in the *Daya Bhaga* is the authority of *Vrihaspati,* who says, "that a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased, half the body survives;" adding, by way of question, "How then should another take his property when half his person is alive?" So that the right, in truth, rests upon the oneness of the husband and wife, and not upon the existence of the separate estate and interest of the husband in the property during his life. Such a separate estate, as a matter of inference, might be deduced as well from the descent of the father's undivided share to sons, which is common to both schools of law, as from its descent to his widow, which is peculiar to the Bengal school. After reviewing and commenting upon the Sudr. Court decisions cited in the argument, the Chief-Justice proceeded :—"We see nothing in these decisions which materially conflicts with, and some of them support, the opinion we have above expressed;" and *Sir Thomas Strange,* vol. i. p. 202, expressly says, "That in favour of a *bonâ fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due out of the share of him with whom he had dealt; and for this purpose a Court would be warranted in enforcing a

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partition. What the purchaser, or execution creditor of the co-parcener is entitled to, is the share, to which, if a partition took place, the co-parcener himself would be individually entitled, the amount of such a share, of course, depending upon the state of the family. In this case there appear to be two brothers and a step-mother, and the share of each brother is a moiety. There is no evidence of Ayyasvami's having sons, if he had they would be entitled to shares in their father's moiety, and so the property available for the plaintiff would, to the extent of their shares, be reduced; and, except in this way, the existence of sons would not, we think, affect the plaintiff's right.

MALABAR LAW—SALE BY CONSENT OF ALL THE MEMBERS OF THE TARAWAD.—According to the Malabar law, a sale of family property is valid when made with the assent, express or implied, of all the members of the tarawad, and when the deed of sale is signed by the karanavan and the senior anandravar if *sui juris.*

Such signature is *primâ facie* evidence of the assent of the family, and the burden of proof of their dissent lies on those who allege it, *Kondi Menon* v. *Sranginreagatta Ahammada*, 1 *Mad. H. C. R.* 248.

In this case, a question was raised whether a sale of a paramba by the karanavan, (head of the family who is the senior male of whatever branch,) and the eldest anandravar for the benefit of the tarawad (an united family community) was valid. The appellant, a junior member of the tarawad, not having joined in the deed whereby the sale was effected. The civil judge found that the sale had been made to pay debts which a former karanavan had incurred for the benefit of the family, and that the instrument of sale had been executed by the karanavan and the senior anandravar. It was contended that it was necessary to the validity of the sale, or, at all events, that all the anandravars should give their assent in writing, citing *Stra. Man.* § 390. *Holloway, J.*, in delivering judgment, said, "All that is necessary is that the sale should be made with the assent, express or implied, of all the members of the tarawad, and that the karanavan and the senior anandravar, (if *sui juris,*) should join in the deed of sale. Such assent will be implied where, as in the present case, the sale is found to have been for the benefit of the family. Here the karanavan and the senior anandravar executed the deed. Such execution is *primâ facie* evidence of the assent of the whole family. The onus of proving their dissent rests on those who deny their assent."

THE CONSENT OF THE ANANDRAVAR IS NECESSARY.—The assent of the anandravars is necessary to a sale of tarawad land by a karanavan. The chief anandravar's signature to the instrument of sale is sufficient, but not indispensable evidence of such assent.

This suit was brought to recover lands sold to the first defendant by the karanavan of the plaintiff, and of the second and sixth defendants. The purchase was proved, and that the plaintiff,

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was present, and offered no objection thereto. It did not appear that the instrument of sale was signed by any of the vendor's Anandravars, the district munsiff dismissed the suit, and the officiating sub-judge, upon appeal, affirmed his decree. It was contended on appeal in the High Court that the signatures of the chief anandravar and of the karanavans were indispensable, although the appellant was present, citing *Stra. Man.* 1st ed. 378, 2d ed. 390. But the court held that the sale by a karanavan requires the consent of the anandravars. But the signature of the chief anandravar, if *sui juris*, is sufficient evidence of the assent of himself and the rest, to the sale, and throws the burden of proving dissent therefrom on him who alleges such dissent. The anandravar's assent may be proved by means other than the signature of the senior, and in the present case, when the Court has found that the paintiff, an anandravar, was present, and assented to the sale, he clearly has no ground of appeal, *Kaipreta Ramen* v. *Makkaiyil Mutoren*, 1 *Mad. H. C. R.* 359.

Personal property, whether ancestral or self-acquired—Property acquired or recovered is alienable—Restrictions on alienation.—With respect to personal property of every description, whether ancestral, or self-acquired, and with respect to real property acquired, or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit subject only to spiritual responsibility, 1 *Macn. Prins. H. L.* 3; 2 *Dig.* 32; *Vrihaspati.*

The power of the father being thus restricted in respect to ancestral real property, and wills and testaments being wholly unknown to the Hindoo law, it follows, for the sake of consistency, that they must be wholly inoperative, and that these provisions must be set aside where they are at variance with the law; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his lifetime, 1 *Macn. Prins. H. L.* 3. But see *post*, "alienation by wills," *Stra Man.* § .

Section II.

Alienation by will—Conflicting opinions as to the existence of testamentary power—Ancestral real property cannot be alienated at pleasure—A man cannot bequeath what he could not bestow by deed, or gift, or partition—Extent of power of bequest in Madras—Judgments in favour of wills—Judgments against recognition of wills—Validity of nuncupative will—No transaction of Hindoo law requires to be in writing—Childless Zemindar may alienate by deed or will such portion of his estate as would not vest in his wife without her consent—Provision in partition deed against alienation—Testamentary disposition regulated by Hindoo law

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—Direction that property shall go in male line—Rights of widow of one of heirs—Division of accumulations does not constitute a divided family—Rules for construction of Hindoo's wills—Accumulations of joint-family—Right of wife of co-sharer—Testamentary power in North Western provinces—Construction—Devise of self-acquired property by way of remainder or executory devise—Income—Accumulation—Hindoo widow—Rights of maintenance—Ancestral property—Adoption—Construction of from generation to generation—Descendants—Rule against perpetuity—Who are descendants—And what estate they take—Ancestral and self-acquired property—Testamentary right in Bengal and Madras—Provision for wife—Her rights as heir—Testamentary power in Madras over ancestral and self-acquired property—Testator having sons—Immoveable ancestral estate—Will by minor—Concurrence of sons during minority dispensed with—Incapacity to alienate arising from personal causes—Private or separate property—High Court cannot compel a native to prove a will.

ALIENATION BY WILL—CONFLICTING OPINIONS AS TO THE EXISTENCE OF TESTAMENTARY POWER.—*Sir Thomas Strange* in his *Hindoo Law*, and *Mr Justice Strange* in his *Manual*, have contended that a Hindoo cannot alienate his property by will, whilst *Mr Macn. Prins. H. L.* 3, entertains a contrary opinion, contending that it is not a new power conferred on the Hindoos, but one previously existing, although perhaps never exercised in consequence of the paternal provisions of their law, which divided their property equally amongst their descendants. But the learning on the subject is now rendered to some extent unprofitable, as the power has been recognised by Her Majesty's Judicial Committee of the Privy Council in a case followed by a decision of the High Court at Madras, presently referred to. These decisions have certainly not given satisfaction; and as it is not improbable that the question may again come before the Judicial Committee of the Privy Council, or become the subject of legislative consideration, it is advisable to retain here the opinions of writers on Hindoo law on this much discussed subject.

Mr Macn. 1 *Prins. H. L.* 3, says, A will is nothing more nor less than the legal declaration of a man's intentions which he wills to be performed after his death, but willingness to do that which the law has prohibited cannot be held to be a legal declaration of a man's intentions. There may be a gift in contemplation of death, but a will in the sense in which it is known in the English law is wholly unknown in the Hindoo system, and such gift can only be held valid under the same circumstances under which an ordinary deed would be considered valid. What may not be done *inter vivos* may not be done by will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law, which, however, if carried into effect cannot, according

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to the law of Bengal, be set aside, and which, though immoral, (and in one sense of the word illegal,) cannot be held to be invalid. For instance a father, though declared to have absolute power over property acquired by himself, is prohibited from making unequal distribution of such property among his sons, by prefering one or excluding another, without sufficient cause. This has been declared in the *Daya Bhaga* to be a precept, not a positive law; and it is therein laid down that a gift or transfer, under such circumstances, is not null, "for a fact cannot be altered by a hundred texts." There is nothing inconsistent in this, as the doctrine is rather confirmatory of the texts, which declares the absolute nature of the father's power over such property; but it has been held to extend to the legalising of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and the son to be equal in respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or, in other words, to signify that an act may be legally right though morally objectionable. Thus a co-parcener is prohibited from disposing of his own share of joint and ancestral property; and such an act where the doctrine of the *Mitacshara* prevails (which does not recognise any several right, until after partition, on the principle of *factum valet*) would undoubtedly be illegal and invalid. But according to the *Daya Bhaga*, which recognises this principle, and also a several, though unascertained right in each co-parcener, even before partition, a sale, or other transfer, under such circumstances would be valid and binding, as far as concerned the share of the transferring party. In the cases of *Bhowaneepershad Goh.* v. *Musst. Taramunee,* 3 *Sud. Dew. Ad. R.* 138, and *Ramkunhai Rai* v. *Bungchund Bunhoojea, ib.* 17, it was determined that according to Hindoo law, as current in Bengal, a co-parcener may dispose of, by gift, or otherwise, his own undivided share of the ancestral landed property, notwithstanding he may have a daughter and a daughter's son living, while in the case of *Nundram* v. *Kashee Pande,* 3 *S. D. A. R.* 232; *Ooman Dutt.* v. *Kunhia Singh, ib.* 144, it was determined that, according to the law as current in Behar, a gift of joint undivided property, whether real or personal, is not valid even to the extent of the donor's share. I am aware that cases have been decided in opposition to the doctrine for which I here contend, *Macn. ib.*

Cases cited involving the doctrine of wills and unequal distribution.—The first is *Ruschiklal Dutt* v. *Cheytunchurn Dutt,* cited by *Sir Thomas Strange,* 1 vol. 263. He states that the case was decided in 1789; that the testator, a Hindoo, the father of four sons, and possessed of property of both descriptions, ancestral and self-acquired, having provided for his eldest by appointment, and

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advanced to the three younger ones, during his life, the means of their establishment, thought proper to leave the whole of what he possessed to his two younger sons to the disherison of the two elder, of whom the second disputed the will; that on reference to the pundits they affirmed the validity of the will, and that Sir W. Jones and Sir Robert Chambers concurred in this determination. The author of the *Elements* adds—"The ground with the pundits probably was, (the Bengal maxim,) that however inconsistent the act with the ordinary rules of inheritance, and the legal pretensions of the parties, being done, its validity was unquestionable. To this it can only be answered that the motives which actuated the pundits in their exposition of the law, and the judges in their decision, are avowedly stated on conjecture only, and that if such motives are allowed to operate there must be an end to all law, the maxim of *factum valet* superseding every doctrine and legalising every act. The particulars of the case not having been stated, it cannot with safety be relied on as a precedent," 1 *Macn. Prins. H. L.* 6.

The second case is that of *Eshandchund Rai* v. *Eshandchund Rai*, 1 *S. D. A.* 2, (1792,) where it was held that a gift in nature of a will made by the zemindar of Nuddea, settling the whole of his zemindary on the eldest of his four sons, subject to a pecuniary provision for the younger ones, was good. *Macn. ib.* says, with the exception of the last, none of the six reasons assigned for this opinion by the pundits are of any weight. That was, that a principality may lawfully and properly be given to an eldest son. This is doubtless correct, and taking a zemindary in the light of a principality is applicable, and would alone have sufficed to legalise the transaction. A principality has indeed been enumerated amongst things impartible. With respect to the other reasons assigned, to the first it may be replied that, "according to law, a present made by a father to his son through affection shall not be shared by his brethren." It may be objected that this relates to property other than ancestral, over which the father is expressly declared to have control. To the second, "That what has been acquired by any of the enumerated lawful means, among which inheritance is one, is a fit subject of gift;" that this supposes an acquisition in which no other person is entitled to participate, and not the case of ancestral estate in which the right of the father and son has been declared equal. To the third, "That a co-heir may dispose of his own share of undivided property." That his right to do this is admitted, but this does not include his right to alienate the shares of others. To the fourth, "That although a father be forbidden to give away lands, yet, if he nevertheless do so, he merely sins, and the gift holds good." That the precept extends only to property over which the father has absolute authority, and cannot affect the law, which expressly declares him to have no greater interest than his son in ancestral estate. And to the fifth, "That *Raghunandana* in the *Dayatatwa*, restricting a

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father from giving his lands to one of his sons, but clothes and ornaments only, is at variance with *Jimuta Vahana*, whose doctrine he espouses, and who only says that a father acts blameably in so doing," that no such variance in reality exists. In addition to the above, it may be stated that the suit in question was brought by an uncle against his nephew to recover a portion of an estate which had previously devolved entire on the brother of the claimant, and which, it appeared, had never been divided, *ib.*

In *Ramkoomar Neaee Bachesputee* v. *Kishenkinker Turk Bhoosun*, 2 *S. D. A. R.* 42, (1812,) it was maintained that the gift by a father of the whole ancestral estate to one son to the prejudice of the rest, or even to a stranger, is a valid act (although immoral) according to the doctrine received in Bengal. The authorities quoted by the pundits would have been more applicable to the maintenance of the opposite doctrine. The following were referred to:—1st, *Vishnu* cited in *Daya Bhaga*, "When a father separates his sons from himself his will regulates the division of his own acquired wealth." 2d, A quotation also from the *Daya Bhaga*, "The father has ownership in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions, and has power to distribute them unequally;" as *Yajnavalchya* intimates, "The father is master of the gems, pearls, and corals, and of all other moveable property; but neither the father, nor the grandfather is so of the whole immoveable estate." Since the grandfather is here mentioned, the text must relate to his effects. By again saying "all," after specifying gems, pearls, &c., it is shown that the father has authority to make a gift, or any similar disposition of all effects, other than land, &c., but not of immoveables, a corrody and chattels, *i.e.* slaves, since here also it is said "the whole," this prohibition forbids the gift, or other alienation of the whole, because immoveables and similar possessions are means of supporting the family, for the maintenance of the family is an indispensable obligation, as *Menu* positively declares, "The support of persons who should be maintained is the approved means of attaining heaven; but hell is the man's portion if they suffer." Therefore, let a master of a family carefully maintain them. The prohibition is not against a donation, or other transfer of a small part, not incompatible with the support of the family, for the insertion of the word "whole" would be unmeaning if the gift of even a small part were forbidden. The text of *Yajnavalchya* cited in *Prayushchittavivek*, "From the non-performance of acts which are enjoined from the commission of acts which are declared to be criminal, and from not exercising a control over the passions, a man incurs punishment in the next world." An examination of these authorities will make it evident that they are totally insufficient for the support of the doctrine to which they were intended to apply, 1 *Macn. Prins. H. L.* 8–10.

In *Sham Singh* v. *Musst. Umraotee*, 2 *S. D. A. R.* 74, (1813,)

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it was determined that, by the Hindoo law, as current in Mithila a father cannot give away the whole ancestral property to one, to the exclusion of his other sons. The author of *Considerations on Hindoo Law*, commenting on this decision, infers that the *S. D. A.* would not have entertained any doubt as to the validity of the gift had it depended upon the law as current in Bengal; but there seems to be no other ground for this inference than the erroneous doctrines laid down in the two previously cited cases, together with the fact of the parties having disputed as to which law should govern the decision.

In *Bhowannychurn Bunhoojea* v. *The Heirs of Ram Kaunt Bunhoojea*, 2 *S. A. R.* 202, (1816,) it was held that an unequal distribution made by a father among his sons of ancestral immoveable property is illegal and invalid, as is also the unequal distribution of property acquired by the father, and of moveable ancestral property, if made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. The question as to the father's power was thoroughly investigated on this occasion, there being a difference of opinion between the pundits attached to the *S. D. A.* The following question was proposed to the pundits of the Supreme Court, a pundit of the Calcutta Provincial Court, and another attached to the College of Fort-William :—" A person whose elder son is alive, makes a gift to his younger of all his property, moveable and immoveable, ancestral and acquired, is such a gift valid according to the law authorities current in Bengal or not? and if it be invalid, is it to be set aside?"

The four pundits above referred to gave the following answer, " If a father, whose oldest son is alive, make a gift to his younger of all his acquired property, moveable and immoveable, and of all the ancestral moveable property, the gift is valid, but the donor acts sinfully. If during the life of the elder son he makes a gift to the younger of all the ancestral immoveable property, such gift is not valid. Hence if it have been made it must be set aside. The learned have agreed that it must be set aside, because such a gift is, *à fortiori*, invalid, inasmuch as he, a father, cannot even make an unequal distribution among his sons of ancestral immoveable property; as he is not master of all; as he is required by law, even against his own will, to make a distribution among his sons of ancestral property, not acquired by himself—*i.e.*, not recovered, as he is incompetent to distribute such property among his sons until the mother's courses have ceased, lest a son subsequently born should be deprived of his share; and as while he has children living, he has no authority over the ancestral property." Authorities quoted, 1st, *Vishnu*, cited in the *Daya Bhaga*, " His will regulates the division of his own acquired wealth." 2d, *Yajnavalchya*, " The father is master of the gems, pearls, corals, and of all other moveable property." 3d, *Daya Bhaga*, " The father has ownership

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of gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him just as in his own acquisitions." 4th, *Daya Bhaga*, "But not so if it were immoveable property inherited from the grandfather, because they have an equal right to it. The father has not in such case an unlimited discretion." Unlimited discretion is interpreted by *Srikrishna Tarcalancara* to signify a competency of disposal at pleasure. 5th, *Daya Bhaga*, "Since the circumstance of the grandfather being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth." Commentary of *Srikrishna* on the above texts, "Although the father be in truth the lord of all the wealth inherited from ancestors, still the right here meant is not merely ownership, but competency of disposing of the wealth at pleasure; and the father has not such full dominion over property ancestral." 6th, *Daya Bhaga*, "If the father recover paternal wealth seized by strangers, and not recovered by other sharers, nor by his own father, he shall not, unless willing, share it with his sons, for in fact it was acquired by him." In this passage, *Menu* and *Vishnu* declaring that "he shall not, unless willing, share it, because it was acquired by himself," seem thereby to intimate a partition amongst sons, even against the father's will in the case of hereditary wealth not acquired (*i.e.*, recovered) by him. 7th, *Daya Bhaga*, "When the mother is past child bearing," regards wealth inherited from the paternal grandfather. Since other children cannot be borne by her when her courses have ceased, partition among sons may then take place; still, however, by the choice of the father. But if the hereditary estate were divided while she continued to be capable of bearing children, those born subsequently would be deprived of subsistence, neither would that be right, for a text expresses; "they who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support, and the dissipation of their hereditary maintenance is censured." *Srikrishna* has interpreted "the dissipation of hereditary maintenance to signify" the being deprived of a share in the ancestral wealth. *Dwaitanirnaya*, "If there be offspring, the parents have no authority over ancestral wealth, and from the declaration of their having no authority, any unauthorised act committed by them is invalid." Text of *Vijnyaneswara*, cited in the *Medhatithi*, "Let the judge declare void a sale without ownership, and a gift, or pledge unauthorised by the owner." The term, without ownership, "intends incompetency of disposal at pleasure." Text of *Narada*, "That act which is done by an infant, or by any person not possessing authority, must be considered as not done. The learned in the law have so declared."

In commenting upon these cases, *Macn.* 1 *Prins. H. L.* 13, says, "I have given the above opinion, together with the authorities cited in its support, from its being apparently the

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most satisfactory doctrine hitherto recorded on the subject. By declaring void any illegal alienation of the ancestral real property, it preserves the law from the imputation of being a dead letter, and protects the son from being deprived at the caprice of the father of that, in which, the law has repeatedly and expressly declared them both to have equal ownership."

The case of *Ramkaunt* is the latest reported decision by the *S. D. A.* connected with the point in question. Various cases have been cited by the author of the *Considerations*, (p. 316,) in which wills made by Hindoos have been upheld by the Supreme Court, though at variance with the doctrine above laid down. The will of *Rajah Nobkishen*, who, although he had a begotten and an adopted son, left an ancestral talook to the sons of his brother, is perhaps the most remarkable of the cases cited; but in this, as well as in most of the cases, the point of law was never touched upon, the parties having joined issue on questions of fact. Upon the whole, I conclude that the text of the *Daya Bhaga*, which is the groundwork of all the doubts and perplexity that have been raised on this question, can merely be held to confer a legal power of alienating property where such power is not expressly taken away by some other text."

ANCESTRAL REAL PROPERTY CANNOT BE ALIENATED AT PLEASURE.—Thus in Bengal a man may make an unequal distribution among his sons of his personally-acquired property, or of the ancestral moveable property, because, though it has been enjoined (*Katyayana*, 2 *Dig.* 540) upon a father not to distinguish one son at a partition made in his lifetime, nor on any account to exclude one from participation without sufficient cause, yet as it has been declared in another place that the father is master of all moveable property and of his own acquisitions, (*Yajnavalchya*, 2 *Dig.* 159,) the maxim that a fact cannot be altered by a hundred texts here applies to legalise a disregard of the injunction, there being texts declaratory of unlimited discretion of equal authority with those which condemn the practice.* In other parts of India, where the maxim in question does not obtain, the injunction applies in its full force, and any prohibited alienation would be considered illegal, see Partition; see 1 *Stra. H. L.* 123; 1 *Bomb. R.* 154, 372, 380; 2 *ib.* 6, 471; 1 *Macn. Prins. H. L.* 15.

The question as to the power of a Hindoo to make a will is discussed in a note to *Morl. Dig.* vol. i. p. 612; the author says, "The question as to whether a Hindoo has or has not the power of making a will appears to depend entirely upon the sense in which we use the word 'will.' That he cannot make a will to the same extent as an English testator is certainly true, but there is

* By this construction the maxim is made to mean that one text (or fact of that kind) cannot be repealed by other texts, but such an interpretation must be found as will reconcile them all.

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also no doubt, that he can legally dispose of his property under certain restrictions, by a writing or declaration, accompanied by certain formalities, to take effect after his death." Surely this is in *fact* and *operation* a will, and comes within the definition, "A will is a declaration of the mind, either by word or writing, in disposing of an estate, and to take place after the death of the testator," 7 *Bac. Abr.* 299, 6th Ed."

A MAN CANNOT BEQUEATH WHAT HE COULD NOT BESTOW BY DEED, OR GIFT, OR PARTITION.—All the best authorities on Hindoo law, with *Henry Colebrooke* at their head, concur in stating that the will of a Hindoo may be recognised, although he cannot will away property which could not have been the subject of gift during his lifetime. *Colebrooke*, in a lettter to *Sir Thomas Strange*, says, "*The principle I would lay down is, that a man cannot confer on a stranger, or his own kin, by will (which I consider to be a donation in contemplation of decease) what he could not bestow by deed of gift, or partition of patrimony.* The utmost that can be said is that he may do that by testament which he could have done by partition, or donation between living persons;" and again he says, in provinces in which the authority of the *Mitacshara* prevails, a Hindoo is restricted from giving away immoveables, and from making any other partition of his possessions among his male descendants, but such as the law has sanctioned; consequently, he would be withheld from distributing immoveables in a mode unauthorised by the law, but may bestow moveables, of which the law allows him to make gifts through motives of natural affection, not, however, to the extent of his whole property. In short, if there be no sons, or male descendants, and the property be not shared by a co-heir, the whole of his possessions being his separate and distinct property, may be disposed of by will as he pleases, 2 *Stra. H. L.* 436. In another letter he expresses himself still more strongly, giving it as his revised and considered opinion "that a Hindoo in Bengal may leave by will, or bestow by deed or gift, his possessions, whether inherited or acquired, and the gift, or the legacy, whether to a son, or to a stranger, will hold, however reprehensible it may be, as a breach of an injunction or precept," 2 *Stra. H. L.* 438."

"This, I think, is a fair statement of the law on this difficult subject. Amongst those who maintain that a Hindoo cannot make a will, we find *Mr Ellis*, no mean authority, who says, What then is the will of a Hindoo? If the distribution of property made by it be contrary to the provisions of *Dharmashastra* it is invalid; if in conformity with them, it is unnecessary, 2 *Stra. H. L.* 421. This, though specious, is not strictly true, since by the extended sense of the law of gift, a Hindoo can vary the rules of distribution without violating the provisions of the law.* Again, does not a

* According to the Benares School we are aware of no authority for this assertion.

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Hindoo alter the distribution by an *anumati Putra?* in which he authorises his widow to adopt a son after his death, who becomes his heir to the exclusion of the relatives?* Indeed, a writing is not absolutely necessary, verbal authority being sufficient; yet this is in conformity with the law, and may be regarded in some sort, and to a certain extent, as a testamentary writing, or nuncupative will. It is, after all, of but little importance, by what we call the instrument or declaration by which a Hindoo governs the disposition of his property after his death, and the question resolves itself into a verbal dispute. *A will is everywhere, to all intents and purposes, a gift, to take effect after the decease of the donor; and the Hindoo gift, in contemplation of death, has to the extent allowed by the doctrine of each particular school of laws, exactly the same operation as a will in England; and although the Hindoo law does not recognise the existence of a will by name, and as such, still the power of disposition under that law is precisely the same in effect as that exercised by what we call a will in England,"* 1 *Morl. Dig.* 612.

"I confess that I cannot see why any legal disposition of property after a man's death should, as I have heard argued, be declared not to be a will simply because such disposition may be under more restrictions than wills were by the civil law. Were it so, we might say that, by the laws of France, a Frenchman cannot make a will. 1 *Haye's Introd. to Conv.* 596, 5th ed," 1 *Morl. Dig.* p. 612.

"If a law allow any discretionary power over property after a man's death, no matter how limited such power may be, the exercise of it, is a will, or testamentary disposition, *i.e.*, the declaration of a man's wishes as to the disposition of his disposable property subsequent to his death, and in this sense the Hindoo can most undoubtedly make a will."

"There is no doubt but that whatever may have been the case in the courts of the Honble. Company wills made by Hindoos are, and always have been, recognised in the Supreme Courts, and *Sir F. Macnaghten* mentions, that even in his time, where there was a large property to dispose of, intestacy was uncommon. *Sir Thomas Strange* states his belief, that "to the southward, Hindoo wills were only recognised in the King's Courts." A reference, however, under the present title, to the placita 25 b, *et seq.*, will show that wills, Hindoos', have been upheld in the courts of the Hon. Co. in all the Presidencies, with the restriction, that they cannot bequeath property which they were incompetent to alienate during their lifetime.

"It seems on the whole, that there has not been any very great discrepancy between the recognition of Hindoo wills by the Queen's, and Hon. Company's courts. *Sir F. Macnaghten* expressly says, "It is now perfectly understood from the decisions that have taken place in the Supreme Court, that the devise, or bequest of a Hindoo

* This is a perversion of the doctrine of adoption.

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will be supported there, if it be made of such property as the testator could lawfully (whether sinlessly or not,) have disposed of by gift in his lifetime. But the Court never professed to go further than to permit that to be effected *by will*, which might have been done *inter vivos*."

Extent of power of bequest in Madras.—*Mr Justice Strange* in his *Manual*, § 174–180, says :—The argument in favour of countenancing wills by Hindoos is that a man may bequeath by will what he could make gift of in life. It is to this extent that the power of bequest has been allowed, (2 *Stra. H. L.* 436, 445, *C.* and *S.*)

Judgments in favour of wills.—The practice of the Sudder Court of Madras in respect of admitting the power of a Hindoo to devise property by will has varied.

There are two judgments by this court upholding wills. The first was passed in *S. A.* 3 of 1824. The property then in issue was self-acquired, and the court affirmed the will because the testator could have alienated it in his lifetime. The other judgment was given in *R. A.* 43 of 1849. This decision was passed by a single judge, confessedly ignorant of the law. He sought to guide himself by authorities, but found them conflicting. Supported by the opinion of the pundits, and a judgment by the Calcutta Supreme Court, affirmed by the Privy Council, he upheld the will then in issue, which appointed trustees to the testator's property to the prejudice of his widow. The pundits then applied to are the same who have since declared that no Hindoo can make a will, and they explain that they gave the opinion rested on, in the above case, under the idea that they were called to test the will by the power the testator had to deal with the property during his lifetime in the manner he had done by will. There are three judgments by the same Court, in which it is indicated that the power of a Hindoo to devise by will would have been admitted, had the wills then in question not exceeded the power the individuals making them had, to alienate when in life. These were given in *R. A.* 16 of 1860, and *S. A.* 65 of 1844, and 352 of 1860.

There are also two judgments by the Privy Council connected with wills arising on cases decided in the Sudder Court of Madras. In the first of these judgments, the will which forms the subject of the decision of the Sudder Court in the first named case, *S. A.* 3 of 1824, was in question; but the suit, which was a fresh one, that had sprang up between the parties subsequently to the said decision, turned not on the validity of the will, but on the power of the testator to alienate, as he had done, during his lifetime, a portion of his property without the consent of his wife, (2 *Moore's In. Ap.* 54, *post*, p. 158.) The other judgment was in affirmation of the decision of the Madras Sudder in the second of the cases above noticed, namely, *R. A.* 43 of 1849. The Privy Council in this judgment, after noticing *Sir Thomas Strange's* observation that the Hindoo lan-

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guage has no term (meaning no technical term) whereby to express what is known in England as a will, argued that "it does not necessarily follow, that what in effect, though not in form, are testamentary instruments, which are only to come into operation and affect property after the death of the maker of the instrument, were equally unknown." They then remark on the prevailing recognition of wills in Bengal, and add, "Even in Madras it is settled, that a will of property, not ancestral, may be good; and, indeed, the rule to that extent is not disputed in this case," *Nagalutchmee Ummal* v. *Gopoo Nadarajachetty*, 6 *Moore's In. Ap.* 345.

Certainly this decision will not stand the test of examination. Had there been instruments of the description supposed by the Privy Council, some trace thereof would have appeared in the numerous law treatises of the Hindoos, nor would the instrument nor the act have been left without a name. Equally unwarrantable, is the assertion that wills of any sort are recognised throughout Madras. The Privy Council in making this assertion must have had in view prominently the operations within the limits of the late Supreme Court, an area embracing but 27 square miles out of the 115,000 square miles forming the Presidency.

There is, however, a sort of testamentary disposition recognised by the Hindoo law, which it will be useful to consider.

"The law (a text of *Narada's*) which says, that anything given by a man when in danger of life is no gift, is applicable only to cases in which the object of the gift was not a charitable one, because *Katyayana* says, whatever may be given, or promised to be given by an individual, whether in good health, or in danger of life, his son is to be caused to carry out, if he dies without giving the same," (*Mitacshara* on Subtraction of Gift,) *post*, p. 155.

Here we have a recognition by the law of the limits within which a Hindoo may exercise the testamentary power, and a declaration that beyond these limits he has no such power. He may make a charitable provision, but none other; and as to this, the effecting it is a matter rather laid upon the conscience of his heir, than legally binding upon him. Any other testamentary disposition he may make, or as it is termed gift, is no gift.

The real state of the law has thus not been examined or understood in any of the above judgments. They have gone upon the assumption, and that of the barest kind, that what a man may do in his lifetime he may direct to be done after his death. There is no precept to favour such a doctrine, and every provision of the law directly opposes it. A man has certain power during his lifetime, but on his death the law takes charge of his property, and directs its descent. Nowhere is there an indication that the property can take any other course than that which the law has assigned to it. The descent is as strictly appointed, as in the law of entail in England. It cannot be broken but by breaking the law.

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The Madras Sudder have, on these grounds, at one period disallowed the power of a Hindoo to make any disposition of his property by will, *Stra. Man. H. L.* § 176.

Judgments against recognition of wills.—A will is not recognised in Hindoo law. A Hindoo may make gift during his lifetime, but to constitute a gift, transfer must take place. Whatever a man dies possessed of passes to his legal heirs. A will, therefore, can have no force among Hindoos, (*Pro. of Sudder Court*, 30th July 1855; *Judgments of Sudder Court in S. A.* 169 of 1858, and 107 of 1859,) *ib.*

A man may in his lifetime alienate his property to the prejudice of his widow, leaving her the means of maintenance; but he cannot make arrangement that such alienation shall take place after his death, since his widow would be entitled to what he died possessed of, (*Sudder Pundits*, 19th July 1852,) *ib.*

A bequest to a son-in-law, to the prejudice of a brother's son, is void, (*Judgment of Sudder Court in S. A.* 659 of 1861.)

The appointment by a father of a guardian to his minor son is invalid. His rights as to the property die with him, and pass to the heir, (*Sudder Pundits*, 12th March 1857,) *Stra. Man. H. L.* § 180.

Mr Justice Strange appears to us to have dealt with this subject according to the principles of Hindoo law. There is one point, however, omitted by him which is worthy of consideration. The term parcener or co-parcener is used in works on Hindoo law by English writers, and is adopted by the Indian courts in their decisions. It is not, however, strictly correct to designate individuals living in association, as a Hindoo joint family, as parceners. That term in English law has a technical signification. *Coke on Littleton*, ch. i. b. 3, 163 a., sec. 241, thus defines the word: "Parceners are of two sorts—to wit, parceners according to the course of the common law, and parceners according to the custom. Parceners after the course of the common law are, where a man, or woman, seised of certain lands, or tenements in fee-simple, or in tail, hath no issue but daughters, and dieth, and the tenements descend to the issue, and the daughters enter into the lands, or tenements so descended to them, then they are called parceners, and be but one heir to their ancestor." *Littleton*, 165, sec. 242, continues, "Also, if a man, seised of tenements in fee-simple or fee-tail, dieth without issue of his body begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid; and in the same manner, where he hath no sisters, but the lands descend to his aunts, they are parceners," &c. It will thus be seen that the term parceners, according to the course of common law, is confined to two or more females who inherit jointly.

"Parceners by custom," according to *Littleton*, ch. ii. sec. 265, p. 175, b., "are where a man, seised in fee-simple, or in fee-tail, of lands or tenements, which are of the tenure called gavelkind in the county

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of Kent, and hath divers sons, and die, such lands and tenements shall descend to all the sons by the custom, and they shall equally inherit and make partition by the custom as females shall do, and a writ of partition lieth in this case, as between females."

The parcener, by custom of the English law, differs from the associated member of the Hindoo family, in that he cannot, as in a joint Hindoo family, be held liable in person or property for obligations contracted for the necessary expenses of the family; nor does his share on death fall into the common stock, subject to distribution, or partition among the surviving members.

The application of the term co-parcener or parcener, to individuals composing a joint Hindoo family is technically incorrect, inasmuch as that term is not applied in English law to any other joint owners, but only to those who have become entitled as co-heirs; *Williams's Real Property*, 7th ed. p. 96. An associated member may exist by birth in a Hindoo family without being a co-heir.

Probably the term "joint" may convey the idea that associated Hindoos are joint tenants. This would also be erroneous. Adhering still to the authority of *Littleton*, we observe that, at p. 181 a., sec. 280, he draws, in the following manner, a distinction: "It is to be understood that the nature of joint tenancy is, that he which surviveth shall have only the entire tenancy according to such estate as he hath, if the jointure be continued, &c. As, if three joint tenants be in fee-simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing; and if the second joint tenant hath issue and die, yet the third which surviveth shall have the whole tenements to him, and to his heirs for ever; but otherwise it is of parceners; for if three parceners be, and before any partition made, the one hath issue and dieth, that which to him belongeth shall descend to his son, and if such parcener die with issue, that which belongs to her shall descend to her co-heirs so as they shall have this by descent, and not by survivor, as joint tenants shall have," &c.

The distinguishing characteristics of joint tenancy are unity of possession, unity of interest, unity of title, and unity of the time of the commencement of such title. Cases may arise where all these unities may be found to exist in respect of property held by an associated Hindoo family, but ordinarily they do not. An only son of a Hindoo has an interest immediately on birth equal to that of his father; but as unity of the time of the commencement of the title does not co-exist, one of the elements of joint tenancy is wanting. If the son has two sons born to him, they, on birth, have an interest in their father's unascertained share of the joint property. Here there is not only an absence of the unity of time of the commencement of title, but also a difference of interest; consequently it is clear that in these cases, and in the generality of other cases, all the elements necessary to constitute joint tenancy do not exist.

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The condition of a joint Hindoo family approaches more closely to tenancy in common. In holdings of this nature unity of possession exists, but the several tenants have a distinct several title to their shares. In the case supposed, the father, his son, and his two grandsons unitedly possess the property; but as the father is entitled to one-half, his son, and two grandsons to the other half, and each of these only to one-third of that, we find there is an absence of unity of interest; hence in these several points the condition of a Hindoo family resembles tenancy in common more than joint tenancy. Moreover, a Hindoo member of an associated family, like the English tenant in common, is, as to his own undivided share, in the position of the owner of an entire and separate estate, and is at liberty, according to the decision we have already cited, to alienate in his lifetime his unascertained and undivided portion. Another difference between joint tenancy and tenants in common in English law is, that survivorship exists in the former, but not in the latter. In this respect the condition of an associated Hindoo family resembles that of joint tenants to a certain extent. For instance, if A., B., and C. are brothers, and none of them have sons, on the death of A. and B., the survivor, C., would take the whole estate. A. and B.,* however, would have been at liberty to alienate their respective shares by a written instrument, to take effect during their lifetime, without partition, and the alienee might enforce his rights against them. We may, therefore, conclude that the condition of an associated Hindoo family is that of a tenancy in common, combined with the right of survivorship, in the event of no valid disposition having been made by a deceased tenant during his lifetime.

These circumstances, we think, are not to be lost sight of in discussing the question whether a Hindoo, living in association, is competent to make a will.

Where the right of survivorship exists, we are of opinion that the principles which regulate survivorship under English law are applicable to survivorship under Hindoo law. The question whether a joint tenant could devise his portion without partition was fully discussed in *Swift ex dimis. Neale* v. *Roberts*, 3 *Burr*, 1488. The Court unanimously held that a joint tenant cannot make a will of what he holds in jointure, and *Lord Mansfield* said that a will would be void both at common law and upon the statute. If it could operate at all it must operate as a severance of the jointure, for it could not operate otherwise; but it cannot operate in that manner because a severance of jointure cannot be effected by that method. *Mr Justice Wilmot* observed, This man, who only held in jointure at the time when he made his will, had not a devisable estate when he made the devise. *Coke upon Littleton* considers the subject as if he were determining the

* Specialties or deeds are not recognised in the Mofussil Courts of India as distinguishable from instruments not under seal.

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conflict of opinion between *Mr Justice Strange*, the Privy Council, and the High Court of Madras. *Et la cause est, pur ceo que nul devise poet prender effect mes apres la mort le devisor et per sa mort tout la terre maintenant devient per la ley a son compagnion* &c. Here both their claims commence at one instant, and although an instant *est unum indivisibile tempore quód non est tempus, nec pars temporis, ad quod tamen partes temporis connectuntur*, and that *instans est finis unius temporis et principium uterius.* Yet in consideration of law there is a priority of time in an instant, as here the survivor is preferred before the devise, for *Littleton* saith that the cause is, that no devise can take effect till after the death of the devisor, and by his death all the land presently cometh by the law to his companion, 1 *Co. Lit.* p. 285, lib. 3, sec. 287.

Even should it be objected that the principle of survivorship does not apply to an associated Hindoo family, since the survivor may be regarded as the next in the order of succession, and therefore takes in accordance with the table of descent, rather than by the principle of survivorship, we are, even in that case, disposed to think that the principle recognised in *Neale* v. *Roberts*, and by *Lord Coke*, is applicable.

Under English law a joint tenant possesses the power to dispose in his lifetime of his own share of the lands, and thereby destroy the joint tenancy; but he cannot exercise this power by will.

So under Hindoo law a man may, during his lifetime, alienate his undivided and unascertained share. If he does, the alienee may enforce the alienation. On his death-bed, he may make a gift. But there is a difference between his power over property while living, and the power to exercise control over it when he ceases to exist. The moment the breath departs, the law steps in and says, the property shall go to the individuals entitled to succeed, in order that they may have the means to defray the expenses of the ceremonies they are bound to perform for the spiritual benefit of their relative. The Hindoo law evidently never contemplated, when entailing the necessity of these ceremonies on the survivors, that a man should have the power of depriving them of the fund to defray the cost, either by abstracting property by way of gift immediately before his death, or by a valid disposition to take effect afterwards. The restraints on alienation, imposed by Hindoo law, were evidently designed to check improvidence, with the view that families might not be left in a state of destitution, or heirs deprived of the means of contributing to the religious welfare of their ancestors. Whatever tends to the production of such a state of things is contrary to the spirit of the law. The text of *Narada*, quoted by *Mr Strange*, at page 47 of his *Manual*, would seem to render it obligatory on the conscience of the son to give effect to the gifts of his father. Gifts of what description? Not all gifts indiscriminately; but merely gifts of a charitable character enuring to the benefit of the soul. These would appear to be the only class of gifts permitted,

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and the allowance of gifts of this class is consistent with the religious tendency which pervades the Hindoo law. It is not the gift which deprives the successor of the means of discharging the burden of the succession, nor a gift made without reference to spiritual benefit that is permitted. Should such a gift be made through the medium of a will, we cannot conceive on what principle, consistently with the spirit of the Hindoo law, the successor is bound to give effect to it.

The subject is involved in difficulty, and as it probably will be remooted, we think legislative action ought to be taken to set the question at rest.

Madras Regulation v. of 1829, provides that "wills left by Hindoos within the territories subject to the Government shall have no legal force whatever, except so far as their contents may be in conformity with the provisions of the Hindoo law, according to the authorities prevalent in the respective provinces under the Presidency."

VALIDITY OF NUNCUPATIVE WILL—NO TRANSACTION BY HINDOO LAW REQUIRES TO BE IN WRITING.—A Hindoo may make a nuncupative will of property, whether moveable or immoveable, *Crinavasammal* v. *Vijaayammal*, 2 *Mad. H. C. R.* 37. Gapaluchariyar, previous to his death directed, in the presence of witnesses, that his property should be equally divided between the appellant, the first defendant, and the second defendant, the son of the first. He left surviving him two daughters. The plaintiff, one of the daughters, brought the suit to recover half of his property. The district munsiff upheld the disposition of the property, and decreed one-third of it to the plaintiff. The civil judge modified the decree by according one-half to the plaintiff, because he thought the transaction amounted to a will, and could not therefore be enforced, referring to *Strange's Man.* § 175, 181–183.

This decree was appealed from, and it was admitted that *Valliarayagum Pillai* v. *Pachche*, 1 *Mad. H. C. R.* 326, established the legality of a Hindoo will. But it was argued that, as wills were introduced into the Hindoo from the English law, the testamentary disposition was governed by the English law, and therefore must be in writing.

Holloway, J., in delivering judgment, observed: The question was, Whether the civil judge was right in treating the transaction void, and in distributing the property as undisposed of, according to the rules of Hindoo law? It could not be denied, after the decision above referred to, following the judgment of the Privy Council, that if Gapulachariyar had, in fact, made a testamentary disposition, it would prevail against the appellant, his daughter, and *pro tanto* disinherit her; but it was argued that this testamentary disposition should be regarded as it would be in England, where, by the Statute of Wills, it would be void. We are unable to assent to the argument that, because a doctrine has been incorporated into the

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Hindoo law from a foreign country,* as a necessary consequence the whole of the foreign law relating to the subject must be imported with it. As a matter of fact, we know that, within the original jurisdiction of the High Court of Bombay, attestation has not been held indispensable, *Muncherjee Pestenjee* v. *Narayan Luxmon*, referred to in 1 *Mad. H. C. R.* 328. Where such introductions take place, the foreign matter, so far as it can be done, must be moulded according to analogies derivable from the indigenous law. There is no transaction of Hindoo law which absolutely requires a writing—contracts of every description, involving both temporal and spiritual consequences, may be made orally; and it would be singular if we were to attempt to rule that all other expressions of will are valid when delivered by word of mouth, but that the expression by a man of his will as to the disposition of his property after his decease shall be wholly invalid, unless reduced to writing. The history of the law of other countries shows that there is nothing in the nature of the transaction to render writing indispensable. . . . . . In England the history of wills is complicated by the distinction between real and personal property. The very nature of tenures after the Conquest prevented the testamentary disposition of lands in England, except in one or two places of custom, *Com. Dig. Gavelkind.* That the Ecclesiastical Chancellors defeated the law is matter of history; and the Statute of Uses, although wholly failing to accomplish the purpose of its authors, effectually rendered lands inalienable, except by conveyance *inter vivos.* This led to the Stat. 31 *H.* viii. c. 1, which legalised the disposition by will or testament of a portion of the testator's lands. The construction put upon that statute was, that a devise under it must be in writing; but, singularly enough, devises by custom were still made until the passing of the Stat. of Frauds, *Co. Lit. by Butler*, n. iii. 6. Nuncupative wills of personal estate were valid until the 1 *Vic.* c. 26. The Roman law made no distinction between an ordinary testament in writing and a nuncupative one.

The rule is thus correctly stated by a modern work of authority: "Si quis autem sine scriptis testamentum ordinare velit sufficit ut coram septem testibus eum videntibus voluntatem suam palam ut exaudiri ab iis possit et intelligi declaret quo facto nuncupatum hoc testamentum firmum perfectum que est," *Warnkoenig Just. Jur. Rom. Priv.* § 553.† Historically, therefore, as well as in the nature of things, writing is not essential to a valid devise. . . . . . It is clear that the deceased voluntarily, in the presence of three witnesses, apparently summoned by himself, declared the manner in which the property, of which he had an

* This is an infelicitous admission. The Court was not justified in applying the doctrines of a foreign system of law to the Hindoo law—it was bound to administer the principles of Hindoo law according to their spirit.

† *Inst. Lib.* ii., *Tit.* x. 14.

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unquestionable right to dispose, should pass after his death. In the absence of any enactment requiring a will to be executed with particular solemnities, we are quite unable to say that this was not an effectual devise.

CHILDLESS ZEMINDAR MAY ALIENATE BY DEED OR WILL SUCH PORTION OF HIS ESTATE AS WOULD NOT VEST IN HIS WIFE WITHOUT HIS CONSENT.—By the Hindoo law a zemindar having no issue is capable of alienating by deed or will a portion of his estate, which, in default of lineal male issue and intestacy, would not vest in his wife without his consent,* *Mulraz Lachmia, widow*, v. *Chalekany Vencata Rama Jagganadha Row*, 2 *Moore's In. Ap.* 54.

The question involved in this case, was the validity by the Hindoo law of a devise made in confirmation of a previous gift by a man having no lineal male heirs in prejudice of his wife, in whom the succession vested in case of no alienation and of intestacy?

Mr Baron Parke, in delivering the judgment of the Judicial Committee of the Privy Council, said the only question is, whether the late Rajah was capable of alienating the property in question, it being part of his zemindary? or whether his wife, the appellant, was entitled by the Hindoo law to the whole of the zemindary for her provision? The Sudder Court examined the Hindoo law officers on that point, and their opinion was clearly in favour of the Rajah's right to make such alienation. That Court thought the will sufficiently proved in the former suit, and upon the authority of the Hindoo law dismissed the appeal. Their lordships agree in such decision.

PROVISION IN PARTITION DEED AGAINST ALIENATION.—H., an Englishman, the father of five illegitimate children by two Madras Hindoo women, who lived together in co-parcenery as Hindoos, their rights being governed by that law, bequeathed to his said children an estate in equal shares. A suit was instituted by one of the children against his brothers for partition of the estate. The parties entered into a deed of razeenamah, by which the shares and amounts to be paid to each were ascertained, and provision made against alienation by sale, mortgage, lease, or security, of any separate share. Held that this deed did not affect the right which each co-sharer had to alienate by will, *Myna Boyee* v. *Ootaram*, 8 *Moore's In. Ap.* 400.

TESTAMENTARY DISPOSITION REGULATED BY HINDOO LAW—DIRECTION THAT PROPERTY SHALL GO IN MALE LINE—RIGHTS OF WIDOW OF ONE OF HEIRS—DIVISION OF ACCUMULATIONS DOES NOT CONSTITUTE A DIVIDED FAMILY.—Although the power of a Hindoo to make a will is recognised, yet the extent of the power of disposition by a testator is to be regulated by the Hindoo law, and cannot interfere with a widow's right to succeed to her husband's estate.

* *Semble.*—A will established in a former suit cannot be impeached in a subsequent suit brought by the same parties, *ib.*

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A Bengalee Hindoo bequeathed all his movaeble and immoveable property to his family idol, and directed that his (four) sons, their sons or grandsons in succession, should enjoy "the surplus proceeds only;" and the will after appointing one of the sons manager to the estate to attend to the festival and ceremonies of the idol, and maintain the family also, directed whatever might be the surplus, after deducting the whole of the expenditure, the same should be added to the corpus; and in the event of a disagreement between the sons and family, directed that after the expenses attending the estate, the idol, and maintenance of the family, whatever net produce and surplus there might be, should be divided annually in certain proportions among the members of the family. At the date of the will the family were joint in estate, food, and worship, the accumulations of the will were divided as directed. Held first, that the gift to the idol was not an absolute gift, but was to be construed as a gift to the testator's four sons and their offspring, in the male line, as a joint family, so long as the family remained joint, and that the four sons were entitled to the surplus of the property after providing for the performance of the ceremonies and festivals of the idol, and the provisions in the will for maintenance.

2d, That the division of the accumulations of the income amongst the members of the family did not constitute them a divided family.

One of the sons of the testator died leaving three sons, one of whom also died without issue, leaving a widow. Held that the direction contained in the will, that the property should go in the male line, did not exclude the widow of the grandson of the testator, and that the widow was entitled to a third share of a fourth part of the property and accummulations, without prejudice to her rights as a Hindoo widow, when the property should be divided, *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*, 8 *Moore's In. Ap.* 66.

Rules for construction of Hindoo's wills.—In the case of *Sreemuttee Soorjeemoney Dossee* v. *Denobundoo Mullick*, 6 *Moore's In. Ap.* 526, the following rules for construing wills of Hindoos were laid down by the Lords of the Committee of the P. C. In determining the construction of a will, what we must look to is the intention of the testator. The Hindoo law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition, nor, so far as we are aware, is there any difference between one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the will are to be considered. They convey the intention of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, among which is the law of the country in which the will is made, and its dispositions are to be carried out.

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If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator in the dispositions he has made had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption.

ACCUMULATIONS OF JOINT FAMILY--RIGHT OF WIFE OF CO-SHARER. —A testator by his will made an absolute gift of his real and personal estate to his five sons (an undivided Hindoo family) in equal shares, and in a subsequent part of his will, in the event of any of his sons dying without a son or son's son, there was a gift over to such of his sons or son's sons as should be alive. After the death of the testator the sons lived together, and no partition of the estate was made, the surplus income and increment being kept with the common stock. Upon the death of one of the sons without leaving male issue, his widow, who was entitled to a life-interest in her husband's estate, claimed her husband's share of the accumulations of income, and the increment thereon. Held that in the absence of any direction of the testator that his sons should continue a joint family,* such intention could not be imported into the will, and that the testator's intention was that his sons should enjoy during their lives their interest in the respective shares of the property, and therefore, that although the deceased co-sharer's share went over to the survivors, the widow of the deceased was entitled to one-fifth of the surplus income which had accumulated since the testator's death and during her husband's lifetime, and the increment arising from such accumulations.

TESTAMENTARY POWER IN NORTH-WESTERN PROVINCES.—By the Hindoo law, as administered in the North-West Provinces, a Hindoo has power to make a testamentary disposition in the nature of a will.

A disputed will made by a Hindoo disposing of self-acquired estate amongst his family established.

It is perfectly competent by the Hindoo law, as at present prevailing, for a Hindoo to make a will. *Mulraz Lachmia* v. *Chalekary Vencata Rama Jugganadha Rau*, 2 *Moore's In. Ap.* 54; *Maulranze Vencata Vardiah* v. *Mulranze Sachmia*, 1 *Mad. Dec.* 438; *Mad. Reg.* xxv. of 1802.

The foundation of the testamentary restriction rests upon the Hindoo law of an undivided family: kinsmen, and co-parceners having a right which cannot be divested without their consent, *The Mitac.* ch. i. s. i. § 30.

Where the *Mitacshara* governs, a father cannot by will exclude his son.

In Bengal a Hindoo may leave by will, or bestow by deed or

* We think it is immaterial what were the testator's intentions. The question is one of fact—did the sons live in union?

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gift, his possessions whether inherited or acquired, 2 *Stra. H. L.* 438; *Mullick* v. *Mullick*, 1 *Knapp, P. C. C.* 245; 1 *Morl. Dig. tit. Will*, pp. 662, 616. The only restriction, according to *Colebrooke*, 2 *Stra. H. L.* 435, 436, is, if the testator has sons.

CONSTRUCTION—DEVISE OF SELF-ACQUIRED PROPERTY BY WAY OF REMAINDER, OR EXECUTORY DEVISE—INCOME—ACCUMULATION—HINDOO WIDOW—RIGHTS OF MAINTENANCE.—There is nothing in the general principles of Hindoo law, or public convenience, to prevent a Hindoo testator from devising self-acquired property, by way of remainder, or executory devise, upon an event which is to happen on the close of a life in being.

A Hindoo testator, in the Presidency of Bengal, by the first clause of his will mentioning his five sons, one of whom since died, and whose share of the property is now in dispute, gave them in effect all his property in such a way, as, if there were no more in his will, would make them absolute owners of it. But in a subsequent clause (eleven) the testator says, "But should, peradventure, any among my said five sons die, not leaving any sons from his loins, nor any son's son, in that event neither his widow nor his daughter, nor his daughter's son, nor any of them, will get any shares out of the share that he has obtained of the immoveables and moveables of my said estate. In that event of my said property, such of my sons and my son's sons as shall then be alive, they will receive that wealth according to their respective shares. If any one acts repugnant to this it is inadmissible. However, if any sonless son shall leave a widow, in that event she will only receive Company's rupees 10,000 for her food and raiment." The family remained joint. Surroopchunder, one of the sons, died after the testator's death without issue male, but leaving a widow, his heiress-at-law. It was held by the Judicial Committee of the P. C. that by the words "not leaving any sons from his loins, nor any son's son," the testator meant, not an indefinite failure of male issue, but a failure of male issue of any one of his sons at the time of the death of that son.

Lord J. Knight Bruce said, in giving judgment, this happened in the case of Surroopchunder, who died without leaving male issue, living at the time. Accordingly an event has happened which the testator pointed out. The testamentary power of Hindoos over their property has long been recognised, and is completely established. Is there, then, anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law, in allowing a testator to give property, whether by way of remainder, or by way of executory bequest, (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being? Their lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and their lordships, therefore, being of opinion that, according to the true meaning of this will, the property was given over, upon an

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event which was to take place, if at all, immediately on the close of a life in being at the time when the will was made, and seeing that that event has happened, consider that the testator, in making this provision, did not infringe, or exceed the powers given him by the Hindoo law, and that the clause effectually gives the corpus of the property to the surviving sons immediately on the death of that son who died without leaving male issue. Held, that upon the death of Surroopchunder without male issue, his interest in the capital of the estate determined, and that the appellant became entitled, as his widow, heiress, and representative, to a fifth part of the accumulations which arose from the testator's estate, from the time of his death to the death of his son Surroopchunder, the part to which she is so entitled, to be held by her as a Hindoo widow, in the manner prescribed by Hindoo law, and that she was also entitled absolutely in her own right to the interest and accumulations which had since Surroopchunder's death arisen from such fifth part of the accumulations. By the decree S.'s widow was declared entitled to rupees 10,000, given by the will, with the benefit of a residence in the family dwelling-house, and participation in the means of worship. The question as to the amount of her maintenance as a Hindoo widow was left open by the Judicial Committee, as that point could be raised on further directions after taking the accounts. *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, 9 *Moore's In. Ap.* 123.

Ancestral property—Adoption.—A will by a Hindoo without male issue, kinsman, or co-parceners, after providing for the maintenance of his widow, daughter, and female relations, devised ancestral and other real and personal estate to trustees upon certain charitable trusts. The will was impeached on the ground that the testator had authorised his widow, if the child of which she was pregnant happened to be a daughter, to appoint a son, such act rendering him incompetent to exercise a testamentary power, and that the testator, being a Hindoo, had no power by law of devising ancestral estate by will. Held, that although in the absence of male issue of the deceased, there was a strong presumption, arising from religious considerations, in favour of a delegation by the deceased to his widow of authority to adopt a son for him, yet that the evidence entirely failed to prove that fact.

And that, by the Hindoo law prevailing in Madras, a Hindoo in possession without issue male, kinsman, or co-parcener, had power to make a will disposing of ancestral as well as acquired estate, *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*, 6 *Moore's In. Ap.* 309.

The principal question in this suit was, Whether the appellant's deceased husband, a Hindoo native of Madras, who was without male issue, kinsman, or co-parcener, was competent by the Hindoo law in force in Madras to make a will disposing of ancestral property? Two other questions were also raised as to testamentary

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mental capacity of the deceased, and whether he had authorised his wife to adopt a son in the event of the child of which she was pregnant turning out to be a female?

And the incidental one, supposing the deceased gave his wife verbal instructions to adopt a son in the event of his having a daughter, would her compliance with these instructions operate to invalidate the will in which no mention is made of adoption? and the pundit answered this question thus: "If the testator had really given his wife verbal instructions to adopt a son in the event of her not bearing male issue, her compliance with these instructions would of course invalidate the will, according to the Hindoo law, it being incompetent for the testator, who authorised the adoption of a son, to alienate the whole of his estate, and thereby injure the means of maintenance of his would-be heir."

The point was not decided; as the question turned upon whether the authority had in fact been given, and which the evidence negatived.

Another point raised was, that the will was illegal, because the widow is the party to whom the law gives the estate.

In *Ramtoonoo Mullick* v. *Rungopaul Mullick*, 1 *Morl. Dig.* p. 39, No, 3, it was held that a Hindoo might and could dispose by will of all his property, moveable and immoveable, and as well ancestral as otherwise; and this decision was affirmed on appeal to the Privy Council, 1 *Knapp's P. C.* 245. *The Right Honourable T. Pemberton Leigh*, in delivering the judgment of the Committee of the Privy Council, said it must be allowed that in the ancient Hindoo law, as it was understood through the whole of Hindostan, testamentary instruments in the sense affixed by English lawyers to that expression were unknown; and it is stated by a writer of authority, *Sir Thomas Strange*, that the Hindoo language has no term to express what we mean by a will. But it does not necessarily follow, that, what in effect, though not in form, are testamentary instruments, which are only to come into operation and affect property after the death of the maker of the instrument, was equally unknown. However this may be, the strictness of the ancient law has long since been relaxed, and throughout Bengal a man, who is the absolute owner of property, may now dispose of it by will as he pleases, whether it be ancestral or not. This point was resolved several years ago by the concurrence of all the judicial authorities in Calcutta as well of the Supreme as of the Sudder Court. No doubt the law of Madras differs in some respects, and among others with respect to wills, from that of Bengal. But even in Madras it is settled that a will of property, not ancestral, may be good; a decision to this effect has been recognised and acted upon by the Judicial Committee, and, indeed, the law to that extent is not disputed in this case.

If, then, the will does not affect ancestral property, it must be, not because an owner of property by the Madras law cannot make

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a will, but because by some peculiarity of ancestral property it is withdrawn from the testamentary power.

It has been very ingeniously argued, that in all cases where a man is able to dispose of his property by act *inter vivos*, he may do so by will, but he cannot do so when he has a son, because the son immediately on his birth becomes co-parcener with the father; that the objection to bequeathing ancestral property is founded on the Hindoo notion of an undivided family, but that when there are no males in the family the liberty of bequeathing is unlimited. It is not necessary for their lordships to lay down so broad a proposition. They think it safer to confine themselves to the particular case before them. Under the circumstances of the testator's family; without male relatives when he made his will, and codicil, and having regard to the instruments themselves, the pundits, to whom this case was referred by the Court, have declared their opinion that these instruments are sufficient to dispose of ancestral estate. That opinion has been affirmed by two judges successively, who appear to have examined the subject very carefully, and these judgments were affirmed by the Judicial Committee.

BY WILL, CONSTRUCTION OF HINDOOS' WILL "FROM GENERATION TO GENERATION"—DESCENDANTS—RULE AGAINST PERPETUITY.—A bequest of ten rupees a month was followed by a direction; "in this manner continue to pay in the legatee's name so long as he shall be alive; after his death continue to pay the same to his descendants from generation to generation." Held, that the legatee took only a life-interest under the bequest.

That the words, "from generation to generation" were synonymous with "absolutely" and "for ever" in an English instrument; that the descendants in existence at the time of the death of the tenant for life took absolutely as a class. Descendants of A. in a Hindoo's will would include children and grandchildren living at his decease, but does not include A.'s brother or widow.

There is no rule of Hindoo law imposing any restriction in point of time on the operation of a bequest creating a series of successive life-interests in each generation of a legatee's descendants.

But *semble*. The grounds of the rule against perpetuities are applicable to the property of Hindoos, and the Court will be very reluctant to construe a Hindoo will so as to tie up property for an indefinite period, *Arumugam Mudali* v. *Ammi Ammal*, 1 *Mad. H. C. R.* 400.

The plantiff and his wife sought to recover a certain sum, arrears of a monthly sum, bequeathed by the testator to M. Shanmuga Mudaliyar, deceased, and his descendants, from the defendant, as sole surviving executrix, with probate of the will of Manali Lutchmana Mudali, deceased. The bequest was in the following words, "Continue to pay ten rupees per month to Shanmuga Mudaliyar, the son of T. Lutchu Ammal. . . . Pay at the rate of five rupees a month to Gopala Krishna Mudaliyar. . . . Then, in this manner continue

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to pay respectively in the names of the aforementioned persons so long as they shall be alive, after their deaths continue to pay the same to their descendants from generation to generation."

It was contended for the plaintiff that Shanmuga took absolutely, or that if he took a life interest, then his descendants took absolutely, so that on his death the plaintiff Sundaram, and the defendant Manikka, became entitled in equal shares to a corpus, capable of producing ten rupees a month. The testator never intended that his brother Balakistna, or other collaterals, should take. Descendants in a Hindoo will, cannot mean the collaterals. So his intention would be defeated, if Shanmuga's widow took in preference to his daughter and granddaughter. The widow cannot be considered a descendant. By English law, Shanmuga would take absolutely, but that law does not apply.

Scotland, C. J. The proper rule of construction by which we must be guided is, we think, correctly laid down in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, 6 *Moore's In. Ap.* 5, 150, and acted upon in *Sonatun Bysack* v. *Sreemutty Juggutsundree Dossee*, 8 *ib.* 66, 85. It would be improper and very unsafe in construing Hindoo wills to follow the decisions of the English courts, upon the construction of English wills, which are founded upon the peculiar effect ascribed to technical words, and to terms ordinarily used by conveyancers with reference to the real property law of England.

The language of the bequest in an English will would probably, be held to give an absolute interest to Shanmuga; but the English authorities bearing upon such a construction depend upon the peculiarities of the English law of property, and upon distinctions between real and personal property, which are altogether unknown to Hindoo law. And the effect of adopting as a rule of construction, that a bequest by a Hindoo to A. and his descendants, or children, or issue, must operate to vest an absolute estate in the first taker, would be, very frequently, to defeat the real intention of the Hindoo testator.

The Chief Justice continued, "In the present case we do not doubt that the testator's intention would be defeated if Shanmuga's brother, Balakistna, were held entitled to take; and this would be the result of applying such rule of construction here if he was undivided, and if the law as to succession between undivided brothers extends to property separately acquired by gift or will, as to which we desire to express no opinion; but we may refer to the case of *Bewun Persad* v. *Mussumat Badha Beeby*, 4 *Moore's In. Ap.* 174, as throwing some light upon the point. So, again, we think the intention of the testator would be defeated by holding that Valli Ammal, the widow of Shanmuga, was entitled to take in preference to his daughter and granddaughter. In using the term 'descendants,' neither the brother, nor the widow could, we think, have been intended; and giving effect, as we must do, to the words of the be-

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quest, in terms limiting Shanmuga's enjoyment of the legacy to the period of his life, we come to the conclusion that the testator's intentions will best be effectuated by holding that Shunmuga took only a life interest."

WHO ARE DESCENDANTS, AND WHAT ESTATE THEY TAKE.—We have next to consider who became entitled to take "as his descendants," and what estate or interest they took. The words of the bequest are, "Continue to pay the same to their descendants from generation to generation." Now the term descendants, if it stood alone would, we think, describe the class of persons to be benefited, and would include both children and grandchildren living at Shanmuga's death, who would take absolutely. But the question arises as to the effect to be given to the additional words "from generation to generation." If these words are to be construed as creating a series of successive life interests in each generation of descendants, there is no existing rule of Hindoo law that we are aware of, which imposes any restriction in point of time upon the operation of such a bequest, and the fund must be held to be inalienable for all time. Such a result has, from an early date, been resolutely resisted by the English courts on the grounds of general utility and public convenience, upon which grounds the doctrine against perpetuity rests. The same grounds appear in reason equally applicable to the property of Hindoos, nor are they opposed to any of the principles of Hindoo law or usage; and the Court would be very reluctant at the present day in dealing with Hindoo dispositions of property by will to adopt a rule of construction which would have the effect of tying up property to a very large amount for an indefinite period. Can we then, in the present case, say that the use of the words "from generation to generation" clearly imports an intention on the part of the testator so to tie up his property? In the next clause of the will he uses the same words when disposing of the Mirasi share in a village. There he directs the first taker Manela Rama Mudaliyar to be put into possession, and to have a deed given to him, expressing that the same should be held and enjoyed by him, his sons, and grandsons, from generation to generation. The reasonable construction of this clause seems to be that the testator intended to pass the whole interest to Manela Rama; and if so, we see no reason for giving a different construction to the same words in the clause in question. On the contrary, considering what the bequest is, namely ten rupees per month; and how, in the course of a few generations, the number of descendants would probably be multiplied, there is, as regards this bequest, one more reason for holding that the testator's intention was that the descendants, at the time of the death of the tenant for life, should take absolutely as a class. The words, "from generation to generation," cannot be called technical words; they are not unfrequently used in common with words of a like kind, such as "while the sun and moon endure:"—in Hindoo written instruments, and by themselves, when so

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used, they do not, in their ordinary signification, import more than "absolutely" and "for ever." In confirmation of this view the learned Chief Justice referred to a minute of *Sir Thomas Monro*, and adds, in conclusion, "In this general sense, we think the testator used the expression in his will, and that he thereby meant to pass all the interest in the property from himself to the objects of his bounty, and had no reference to the creation of a perpetual series of limited estates or interests for life in successive generations." This conclusion derives some additional support, we think, from the fact that the testator has made no provision for the case of the failure of descendants. The female plaintiff, Sandarum, and the female defendant, Manikka Ammal, are entitled in equal shares to an amount sufficient to produce the monthly sum of 10 rupees.

TESTAMENTARY POWER IN MADRAS OVER ANCESTRAL SELF-ACQUIRED PROPERTY.—In *Vallinayagam Pillai* v. *Pachche*, 1 *Mad. H. C. R.* 326, it was held that the Hindoo law in Madras allows the alienation of property by will, whether ancestral or self-acquired; that the testamentary power of a Hindoo in Madras is co-extensive with his independent right of alienation *inter vivos*; and *semble*, that a Hindoo's will would not be invalidated merely by its omission to make provision for a widow.

This case was a special appeal from the decision of the Principal Sudr. Ameen, of Tinnevelle, in *A. S.* Nos. 498, 499 of 1861, reversing upon appeal the decision of the District Munsiff, and the question was, whether or not a certain instrument in writing, executed by Sri Vaikundam Pillai, deceased, in favour of the plaintiff (the special appellant) has a valid operation as a will. It appeared the plaintiff was the maternal grand-nephew of the testator, Sri Vaikundam, was living with him at his death, and upon his death entered upon the possession and enjoyment of the property bequeathed by the will, until dispossessed by the first and second defendants. The testator died without issue, leaving a widow, (the first defendant,) his only other relative him surviving. The will expressly provided for the maintenance of the testator's widow.

The case was fully argued before the High Court, and the authorities cited, and the following judgment, was in substance delivered by the Chief Justice.

In *Nagalutchmee Ummal* v. *Goopoo Nadaraja Chetti*, 6 *Moore's In. Ap.* 309, the testator was possessed of both ancestral and self-acquired property. He left a daughter, but no son him surviving. The appellant (his widow) being pregnant, afterwards gave birth to a second daughter. He maintained a grandmother and aunts. By his will he provided proportionately for the maintenance of his widow and daughters, and other female relations, and made bequests to charitable purposes. The plaintiff (appellant) claimed, as heir, on the ground that the deceased could not dispose of the property by will. The civil judge took the opinion of the pundits of the Sudder Court, who declared that the will was "valid under the Hin-

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doo law," and he accordingly decided in favour of the will. The Sudder Court affirmed this decision, observing that they had referred to all the authorities cited by the appellant, and found that although the opinions regarding wills of Hindoos were, generally, conflicting, yet that the majority were against the appellant, and after referring to *Ramtoonoo Mullick* v. *Ramgopaul Mullick*, (1 *Morl. Dig.* 39 ;) *Macn. Cons. H. L.* 340 ; 1 *Knapps, P. C.* 245 ; *ante* p. 162, and to the opinion given by the law-officers of the Court, they further observe that the argument of the appellant, that the will was not cognisable under *Regulation* v. of 1829, could not be sustained. After an unsuccesful attempt to obtain a review of the judgment, the case came before the Privy Council, and was fully argued ; all the authorities and decisions having been cited on both sides, and the distinction taken between ancestral and self-acquired property. In their considered judgment the Judicial Committee remark that the strictness of the ancient Hindoo law had long since been relaxed, and after pointing out the difference in the law of Bengal and that of Madras, with reference to testamentary power, they uphold the decision of the Sudder Court, No. 3 of 1824, and that of the Judicial Committee upon appeal in 1838, (in *Mulraz Lachmia* v. *C. Vencata Rama Jagganadha Row*, 2 *Moore's In. Ap.* 54.) that in Madras a will of property not ancestral might be good, and affirmed the decree, expressing however no opinion upon the general question as to whether the testamentary power of Hindoos was co-extensive with the right of alienation *inter vivos.*

We have, then, the decisions of the highest Court of Appeal, establishing in affirmance of the decrees of the Sudr. Court, that the Hindoo law of Madras does admit of the testamentary disposition of property, both ancestral and self-acquired. The last decision is directly applicable to the circumstances of this case, and confirmed as well as governed in our opinion by its authority, we are clearly brought to the conclusion that the will in question is valid. It is not necessary for us here to consider and lay down any general rule as to how far or under what other circumstances the law gives to a Hindoo the power of disposal by will. But we may observe that, now that the legal right to make a will is settled, there seems nothing in principle or reason opposed to the exercise of the power being allowed co-extensively (as stated in some of the cases, and forcibly urged in *Nagalutchmee Ummal* v. *Goopoo Nadaraja Chetty*) with the independent right of gift or other disposal by act, *inter vivos*, which, by law or established usage or custom, having the force of law, a Hindoo now possesses in Madras. To this extent the power of disposition can reasonably be considered to be in conformity with the respective proprietary rights of the possessor of property, and of heirs and co-parceners as provided and secured by the provisions of the Hindoo law.

The late case of *Sonatum Bysack* v. *Sreemutty Juggutsoondree Dossee*, 8 *Moore's In. Ap.* 66, was relied upon by the respondent

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as a decision of the Judicial Committee opposed to the authority of *Nagalutchmee Ummal* v. *Goopoo Nadaraja Chitty*, because the right there claimed by the son's widow as heir was upheld. But we think the effect of the decision is quite otherwise. It expressly recognises and confirms the legal right to make a will, (the extent of the power of disposition being regulated by the Hindoo law,) and gives effect to the intention of the testator so far as it was to be ascertained from the terms of the will. In the judgment it is distinctly stated as the ground of the decision as to the widow's right, that the will was silent upon the disposition of the property, in the event of the death of a son leaving no male issue, and therefore the son's share was descendible to the heir, to whom it would go in the absence of any provision made by the will. On behalf of the respondent, we were pressed with a very late special appeal case, No. 447 of 1861, in which the Sudr. Court came to a decision directly contrary to their former judgment, and the decision of the judicial committee in *Nagalutchmee Ummal* v. *Goopoo Nadaraja Chitty*. The only report of the case is a manuscript note in *Sloan's Judicial and Revenue Code*, p. 443, and the sole ground of the decision seems to have been the retraction by the pundits of their former opinion, upon being pointed out the difference between alienation in the party's lifetime and disposition by will. It is hardly to be supposed that the pundits were not fully aware of this distinction so often before referred to, when they gave their first opinion, and therefore difficult to see any safe ground for relying so authoritatively and entirely as the Court seems to have done on their altered opinion. Great confusion and uncertainty in the law we fear would be the result if the mere expression of a change in opinion by the native law officers of the Court were a sufficient ground for departing from the deliberate judgment of a last court of appeal. We are unable to regard the case as a satisfactory one, and are of opinion that no effect can properly be given to the decision as an authority against the validity of the will in the present case. It is not necessary to observe on the other not satisfactorily reported decisions referred to; but as to the cases at pages 67 and 147 of the Sudr. decisions of 1862, we may say that the remarks, so far as we can gather, seem to be based upon there being no provision made in the particular wills for the testators' widows. And as to this we would observe that it is unnecessary in this case to express, and we must not be supposed to have expressed an opinion that a will, otherwise valid, would be rendered invalid by the omission of such a provision.

"In accordance, then, with what we consider upon the cases and authority of the highest judicial decisions to be now the law, our judgment is that the will in this case is valid, and that consequently the decree of the Principal Sudr. Ameen must be reversed."

TESTATOR HAVING SONS—IMMOVEABLE ANCESTRAL ESTATE.—A

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Hindoo, having sons living, may dispose of immoveable ancestral estate by will without their consent, *Doe de Juggomohun Roy* v. *Sreemutty Neemoo Dossee*, 21 Jan. 1831, *Morl. Dig. tit. Will*, § 10, p. 645.

There was a difference of opinion upon the bench in this case, and the question was referred to the judges of the *S. D. A.* by letter, addressed to them by the judges of the Supreme Court. The judges of the *S. D. A.* sent in reply a letter in which they stated their opinion that a Hindoo of Bengal, who has sons, can sell, give, or pledge, without their consent, immoveable ancestral property, and that, without the consent of the sons, he can by will prevent, alter, or affect their succession to such property. The case was accordingly decided in conformity with this opinion.

Minor, will by.—A will made by a Hindoo during his minority was declared to be void, *Hurrosoondry Dossee* v. *Cossenauth Bysack*, 1814; *Macn. Cons. H. L.* 11; *Morl. Dig. tit. Will*, 14.

As to a will by a minor, see 7 *Moore's In. Ap.* 193, 196.

In confirmation of the restrictions on alienation *Sir Thomas Strange*, 1 *H. L.* 18, refers to the form prescribed for a Hindoo *grant*, which reserves what may be necessary for the subsistence of the granter's family, besides his dwelling-house, *Katyayana*, 2 *Dig.* 133; 3 *ib.* 5.

The prohibition forbids the gift,* or other alienation of the *whole* of the estate, (immoveable,) because it is the means of supporting the family, and does not affect the alienation of a small part not incompatible with its support, *Jim. Vahana*, ch. ii. 22–24; *Narada*, 2 *Dig.* 97, 113, 141; *Vrihaspati*, *ib.* 98; *Katyayana*, *ib.* 105, 133; *Dacsha*, *ib.* 110; *Misra*, *ib.* 111; *Beng. R.* 1816, p. 566; 2 *Stra. H. L.*; 5 *Coleb.* In like manner, if there be no land or other permanent property, but only jewels, or similar valuables, he is not authorised to expend the whole; for the reason holds equally. But the declaration of a power over moveable supposes the existence of both sorts of property: it should be so understood, *Srikrishna*, *Jim. Vahana*, ch. xi. s. 26, note.

Concurrence of sons during minority is dispensed.—The concurrence of the sons in the alienation by the father of land as required by the *Mitacshara* is dispensed with when they happen to be minors at the time, and the necessity for the alienation was some distress of the family, or pious work to be accomplished, *Mitac.* ch. i. s. i. 28, 29; 1 *Stra. H. L.* 20; which the other members of the family are equally concerned should not be delayed, *Mitac. ib.* 28, 29.

Of moveables, if descended, such as precious pearls, ornaments, clothes, or other like effects, any alienation to the prejudice of heirs should be, if not for their immediate benefit, at least of a

* Transfer of land may be by sale as well as gift, *Jagannatha*, 8 *Dig.* 432.

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consistent nature. They are allowed to belong to the father, but it is under the special provisions of the law; they are his, and he has independent power over them, if such it can be called, seeing that he can dispose of them only for imperious acts of duty, and purposes warranted by texts of law, 1 *Stra. H. L.* 20; *Mitac.* ch. i. s. 1, 27. Whilst the disposal of the land, whencesoever derived, must be in general subject to their control, thus in effect leaving him unqualified dominion only over personalty acquired, 1 *Stra. H. L.* 20; 2 *ib.* 8, 12, 17; *Coleb. and Suthl.; Jim. Vahana,* ch. ii. § 31, and note; *Yajnavalchya,* 2 *Dig.* 113; 2 *Stra. H. L.* 6, 14, 442.

In Bengal this power is less restricted; the concurrence of the sons being required only in the instance of ancestral immoveable property, *Jim. Vahana,* ch. ii. 27, *et seq.;* 1 *Stra. H. L.* 21, citing *Prunath Das* v. *Caleshunder, Beng. R.* 1805, p. 51; but see *Bowannychurn Bunhoojca* v. *The Heirs of Ramkant Bunhoojca, ib.* 1816, p. 564. But should he in violation of the restriction alien the whole of his property, without such an occurrence the act is valid under an axiom that prevails there, *fustum est quod fieri non potuit,* a doctrine not to be found in the Benares school in *the Mitac., the Smriti Chandrika,* or in *the Madharvya. The Smriti Chandrika* maintaining that what has been unduly given must be considered as not given, and that the restoration of property held under a prohibited gift should be enforced by the ruling power, 1 *Stra. H. L.* 24; 2 *ib.* 432, 440; *Mohun Sal Khan* v. *Ranee Sironmunnee, Beng. R.* 1812, p. 352. *Sir Thos. Strange,* 1 *H. L.* 24, says, "Even in Bengal, inconsistent as it may seem, if a Hindoo father propose to make a partition of heritage in his lifetime, he can by this means divide his property only among his sons. And according to certain prescribed rules, said not to have been hitherto weakened by any express decision," *Jim. Vahana,* ch. ii. 50, 74, 76, 83; 1 *Stra. H. L.* 18, 194; 3 *Dig.* 4; 2 *Stra. H. L.* 437, *vid. tam.* *Coleb* remarks on *Eschanchund Rai* v. *Same,* (the *Nuddea case,*) *Beng. R. ante,* 1805, p. 3. Whereas, if he proceed by way of gift, embracing as this does, distinct from partition, every species of conveyance and charge under the construction put upon it, that it is valid, however improper, and that, though the giver may be culpable, the title of the receiver is good, whoever he may be, and under whatever circumstances it may be created, it being always understood that the giver was the owner of the property, under no personal disqualification or disability. Such being the reasoning, the father of a family then is thus at liberty to disappoint any expectation, however reasonably entertained by either, alienating his property from it altogether, or by substituting amongst its members by this mode a distribution wholly different from the one prescribed by the law so as to have led to the observation that the Hindoo legislators might have saved them-

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selves the trouble of providing rules to regulate a father's distribution if the whole may be evaded by the very easy expedient of calling it a gift instead of a partition, 1 *Stra. H. L.* 25.

INCAPACITY TO ALIENATE ARISING FROM PERSONAL CAUSES.—The Hindoo law provides, that to be capable of alienating property, the alienor must not only be *sui juris*, with reference to idiotcy, lunacy, infancy, or minority, imbecility resulting from age or disease, and duress and degradation. He must also have a clear perception of what he is about. He must not be under the influence of drink, or of any overruling passion, of mistake, or imposition, 1 *Stra. H. L.* 23; *Menu, ch.* viii. § 163; *Narada*, 2 *Dig.* 181, 187, 193; *Yajnavalchya, ib.* 193; *Catyayana* and *Vrihaspati, ib.* 197; *Bhowannychurn Bunhoojca* v. *Heirs of Ramkaunt Bunhooojca, Beng. R.* 1816, p. 564.

PRIVATE OR SEPARATE PROPERTY.—Property acquired by a single man, not shared by co-parceners, may be enjoyed and disposed of by him without those restrictions upon alienation which apply to the head of the family, remoter heirs not being with regard to it, objects of legal care. He may alienate it without the concurrence of any one, 1 *Stra. H L.* 25. Only, even with reference to one thus isolated, what he does not dispose of in his lifetime must be left to descend in a course of inheritance, the right of aliening, with very little exception, being confined to acts to take effect in the life of the grantor.

But if the property is ancestral, it can make very little difference whether the owner be single or married, since in neither case can he dispose of it without consent of the heir, who in the case supposed may be his father, mother, brother, nephew, or other remote relations, 1 *Stra. H. L.* 26.

But that learned author adds, "In support of these positions but little indeed is to be gleaned from any authority accessible to the English reader; the reason of which may be that the Hindoo, reprobating as they do a single state, their law is to a great measure silent as to its rights, *ib.*

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CHAPTER VIII.

STRIDHANA.

SECTION I.

SUCCESSION TO WOMAN'S PROPERTY.

Definition and explanation of stridhana, or woman's property—Derivation—Consists of moveables and immoveables—Has reference to wives and widows chiefly—Not governed by the ordinary rules of inheritance—What constitutes—Different descriptions of.

SCHOOLS GOVERNED BY THE MITACSHARA.—*Nature of the separate property of women—Gifts subsequent—Property devolving by inheritance—Right of husband to succeed to wife's property depends on nature of wife's title,* viz., *whether stridhanum, or peculiar property—Decisions on the subject discussed—Wife or widow may alienate.*

BENGAL SCHOOL.—*Different kinds of—Gift subsequent—Wealth earned by mechanical arts—In case of moveables bestowed on her by her husband—Where taken by husband in case of distress.*

What gifts from strangers—Self acquisitions—Ornaments worn by the wife.

BOMBAY SCHOOL.—*Different kinds of stridhana—The nature and amount of a woman's separate property—Women have no absolute property in their earnings, or in anything but the first six kinds—In some kinds they possess absolute property—But not in immoveable property given by their husbands—Husbands, &c.,* do *not possess absolute power over stridhana—A husband may be compelled to return it.*

MITHILA SCHOOL.—*Different kinds of stridhana—Explanation—Saudayica—How it is to be used—Ornamental apparel—Ornaments worn with consent of husband—Property enjoyed by women after their husband's death—Explanation—How a woman on the death of husband may enjoy his estate—Where she is to live—Chastity of childless widow—Immoveable property—Property protected during life of husband—Alienation of immoveable property—Explanation—Immoveable property inherited from son—Explanation—Use of stridhana in case of distress—Explanation—When husband shall pay principal—When not liable to make good property taken from wife—When not to be repaid—When she can forcibly take her stridhana—Bad wife unworthy of—Honour due to her.*

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Definition, or explanation of stridhana, or woman's property.—It must not be supposed that, because the property of males has hitherto chiefly occupied our attention, women are not objects of the care and protection of the Hindoo law. The property of women is equally a subject of its consideration.

Derivation.—This species of property is termed *stridhana*, or *stridhun*. The word is derived from *sri*, female, and *dhana*, wealth. It does not necessarily mean money, it may consist of anything else of value, as of land, (or formerly slaves), or jewels, or other ornaments. It is chiefly with reference to wives or widows that the law concerning it comes in question, few women among the Hindoos from the time that they are marriageable remaining single. But as we have partially discussed the subject in this work under other heads, we refer the reader to them; see Index, title "Stridhana." We may here, however, observe that, according to the *Mitacshara*, whatever a woman may have acquired, whether by way of inheritance, purchase, partition, seizure, or finding, is denominated woman's property; but it does not constitute her *peculium*, 1 *Macn. Prins. H. L.* 38. See *post*, p. 176.

Stridhana not governed by ordinary rules of inheritance.—This description of property is not governed by the ordinary rules of inheritance. It is peculiar and distinct, and the succession to it varies according to circumstances. It varies according to the condition of the woman, and the means by which she became possessed of the property. *Menu* defines woman's *peculium* thus: "What was given before the nuptial fire, what was given at the bridal procession, what was given in token of love, and what was received from a mother, a brother, or a father, are considered as the sixfold property of a married woman," § 365.

What constitutes.—To constitute stridhana, it must have been the gift not of a stranger, but of a husband or some of the owner's near relations, 1 *Stra. H. L.* 26; 2 *ib.* 19; *Coleb.* If derived from a stranger, or earned by herself, it seems that it vests in the husband, if she have one, and is at his disposal, 1 *Stra. H. L.* 26. Stridhana of a married woman is hers, except in Bengal in the case of land given to her by her husband, of which the dominion remains with him. The husband may use his wife's stridhana in any exigency for which he has not otherwise the means of providing without being accountable for what he has so applied, 1 *Stra. H. L.* 27; viz., general want during a famine, any distress preventing performance of religious duty, sickness, imprisonment, and even the distress of a son, *Jim. Vahana*, ch. iv. s. i. § 24; *Mitac.* ch. ii. s. xii. § 31, *et seq.; Daya Krama Sangraha*, ch. ii. s. ii. § 33, 34; *Devala* and *Yajnavalchya*, 3 *Dig.* 578; 2 *Stra.* 32; 59 *Coleb.* It is not, however, liable to be seized in execution for a debt of a husband, though, had he been arrested, he might have applied the ornament on her neck to his discharge, having no other means of obtaining his liberation. It seems that any gross abuse of her

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property by herself will be controlled while single by her father, while married by her husband, and by her guardians after his death, under the control, however, of the judicial power, *Narada*, 2 *Dig.* 384; *Katyayana*, 3 *ib.* 576, 626. In the Bombay reports there are numerous instances where the Courts refused to exact security from her against misapplication, or to restrict her in the enjoyment or disposal of what she has, 1 *Stra. H. L.* 28, note.

DIFFERENT DESCRIPTIONS OF.—There is a difference of opinion as to the number of descriptions of women's property, 1 *Macn. Prins. H.* L. 38. Some authors confine the number to eight, some to six, some to five, some to three.

SCHOOLS GOVERNED BY THE MITACSHARA.—NATURE OF THE SEPARATE PROPERTY OF WOMEN.—The author of the *Mitac.* cites *Yajnavalchya* in describing the nature of the separate property of women, viz.:—"What has been given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage with another wife, as also any other (separate acquisition) is denominated a woman's property," *Mitac.* ch. ii. s. xi. § 1; *Jim. Vahana*, ch. iv. s. i. § 13.

That which was given by the father, by the mother, by the husband, or by a brother, and that which was presented (to the bride) by her maternal uncles, and the rest, (as paternal uncles, maternal aunts, &c.,) at the time of the wedding before the nuptial fire, and a gift on a second marriage, or gratuity on account of supersession, "to a woman whose husband marries a second wife, let him give an equal sum as a compensation for supersession," and also property which may have been acquired by inheritance,* purchase, partition, seizure, or finding, are denominated by *Menu* and the rest, woman's property, *Mitac.* ch. ii. s. xi. § 2; 1 *Morl. Dig.* 311, 335.

Woman's property is not a technical expression, *Mitac.* ch. ii. s. xi. § 3; see *Jim. Vahana*, ch. iv.

What is given to women at the time of their marriage, near the nuptial fire, is celebrated by the wise as woman's property bestowed before the nuptial fire. That again, which a woman receives while she is conducted from her father's house to her husband's dwelling is instanced as the property of a woman under the name of gift in the bridal procession. Whatever has been given to her through affection by her mother-in-law, or by her father-in-law, or has been offered to her as a token of respect, is denominated an affectionate present. That which is received by a married woman, or by a maiden in the house of her husband or of her father, from her brother, or from her parents, is termed a kind gift, *Mitac.* ch. ii. s. xi. § 5.

That which has been given to her by her kindred, as well as her

* See *Sengamalattammal*, appellant, v. *Valayuda Mudali*, respondent, 2 *Mad. Jur.* 202, *post* 176.

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fee, or gratuity, or anything bestowed after marriage, *Yajnavalchya*, ii. 145; what is given to a damsel by her kindred, by the relations of her mother or those of her father, the gratuity for the receipt of which a girl is given in marriage; what is bestowed or given after marriage or subsequently to the nuptials, *Mitac.* ch. ii. s. xi. § 6.

GIFTS SUBSEQUENT.—It is said by *Katyayana*, What has been received by a woman from the family of her husband at a time posterior to her marriage is called a gift subsequent, and so is that similarly received from the family of her father. It is celebrated as woman's property, *Mitac.* ch. ii. s. xi. § 7.

PROPERTY DEVOLVING BY INHERITANCE.—It would appear from the whole of the chapter in the *Smriti Chandrika*, in which the different kinds of *stridhana* are defined, that property devolving on a woman by inheritance is not classed as stridhana. (See Introduction xi.) According to the *Mitac.*, however, property acquired by inheritance ranks as *stridhana*. This doctrine is questioned, see 2 *Mad. H. C. R.* 402; in which the court observes that property devolving on a woman by inheritance is not stridhana, and does not follow the law of succession peculiar to properties of that description.

RIGHT OF HUSBAND TO SUCCEED TO WIFE'S PROPERTY DEPENDS ON NATURE OF WIFE'S TITLE, VIZ., WHETHER STRIDHANUM, OR PECULIAR PROPERTY.—Property inherited by a woman is not her stridhanum —dictum of *Mitacshara*, contrary to all other schools, and not supported by the *Smriti Chandrika*.

Even although the property inherited by a woman was her mother's stridhanum, once it has devolved, its further devolution is governed by the ordinary rules of inheritance.

Husband can only be heir to his wife if the property be strictly her peculiar property, *Sengamalattammal*, special appellant, (fourth defendant,) *Valayuda Mudali*, special respondent, (plaintiff.) 2 *Mad. Jur.* 202.

This was a special appeal against the decree of the Principal Sadr Amin's Court of Combaconum in Regular Appeal, No. 507 of 1865, reversing the decree of the Court of the District Munsiff of Mannargudy in Original Suit, No. 15 of 1863.

The judgment of the Court was delivered by *Sir Adam Bittleston.*

The plaintiff claims the land mentioned in the plaint as purchaser from the first defendant in July 1862.

The first defendant admits the sale, and alleges that the land in dispute devolved upon him from his wife, Comalattammah, to whom it belonged. Both the plaintiff and the first defendant alleged that Comalattammah and her sister, (the fourth defendant,) upon the death of their mother, divided the property of the deceased; and that the land in dispute fell to the share of Comalattammah.

The second defendant alleges that the land in dispute belonged

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to Kanagatammah, who died five years ago, and descended to her daughter, Sengamalattammah, under whom he, (second defendant,) rents the land.

The third defendant disclaims all interest in the matter, and the fourth defendant, (Sengamalattammah,) concurs in the statement made by the second defendant, alleging also that her sister Comalattammah died in the lifetime of their mother.

The District Munsiff disbelieved the alleged division between the the two sisters, and held that, as they were undivided, the surviving sister, Sengamalattammah succeeded to the whole property left by the mother, whether the other sister Comalattammah predeceased her mother or not. Accordingly he dismissed the plaintiff's suit. Upon appeal, the Principal Sadr Amin reversed this decree. He was of opinion that if Comalattammah succeeded to the mother's estate jointly with her sister her share would, on her death, devolve on her husband in preference to her sister; and he therefore directed two issues to the lower Court :—1st, Did Comalattammah, or her mother, first die? 2d, Whether plaintiff is entitled to recover the land and mesne profits claimed?

These issues were found in favour of the plaintiff; and the Principal Sadr Amin gave judgment accordingly.

Upon special appeal the argument was that, upon the facts found, the first defendant was not entitled as heir to his wife, and consequently could convey no title to the plaintiff; and the question is, Whether upon the death of one of two daughters who succeeded jointly to the stridhanam of their mother, (for it must be taken that this was the mother's stridhanam,) the husband of the deceased is entitled to her share in preference to the surviving sister, no division having taken place between the sisters?

The right of the husband to succeed to his diseased wife's property depends, amongst other things, upon the nature of the title which his wife had in the property, viz., whether it was her stridhanam? whether it came under the class of woman's peculiar property?

In the present case, the property came to the deceased wife by inheritance from her mother; and though, according to the *Mitacshara*, property acquired by inheritance is classed as stridhanam, this is contrary to all the authorities in the other schools of Hindoo law, and is not supported by the *Smriti Chandrika*. It has also been questioned in the judgment of this Court, in special appeal 81 of 1865, 2 *Mad. H. C. R.* p. 402, in which, following the Bengal authorities, the Court held that property inherited by a mother from her son was not stridhanam, and that she took in it only a life interest without power of alienation. On this point we find in *Krishnasawmy Iyer's* translation (ch. xi. sec. iii. par. 8) of the *Smriti Chandrika*, this passage, " Whatever the mother takes, she takes for herself *like* the stridhanam called Adhyagni and the like, and not for the benefit of both herself and her husband." The

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Adhyagni is that which is given to a woman at the time of her marriage, near the nuptial fire, and descends, according to the author of *Smriti Chandrika,* to daughters, the unmarried and unprovided having the preference, and on failure of daughters, to their issue, the female issue however taking before the male.

This instance suggests the explanation, that though in the *Mitacshara* property acquired by inheritance is in general terms classed with the other descriptions of woman's separate property, no more is meant than that *some* property acquired by woman by inheritance will follow the rule of descent applicable to stridhanam, though not falling strictly under any of the descriptions of such property. But in the passage above cited, the author of the *Smriti Chandrika* is dealing only with the question whether in default of the daughter's son, parents inherit jointly or separately, and in what order; and it is in reply to an opinion of *Camboo* that "no order need be stated, for whatever is taken by either of the two parents out of the common property is for the benefit of both," that he likens what the mother takes to the stridhana called Adhyagni. He concludes that the father takes before the mother—another point in which this special authority of Southern India is found at variance with the *Mitacshara,* but in agreement with the Bengal school.

In the case already mentioned at 2 *Mad. H. C. R.* p. 405, the Court suggests that, probably, property inherited from a mother would be rightly classed as shridhanam, and certainly, if the shridhanam of the mother descending to the daughter loses by that descent its character of stridhanam, it is difficult to suppose any other case in which property acquired by inheritance could be held to be stridhanam. Nevertheless, even in this case the Bengal authorities are clearly against it. *Mr Macnaghten* in his *Prins. of H. L.* (p. 38 of the Madras edition of 1865,) says expressly, that "stridhanam which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance; for instance, property given to a woman on her marriage is stridhanam and passes to her daughter at her death; but at the daughter's death, it passes to the heir of the daughter like other property, and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue;" and *Prankishen Sing* v. *Moht Bhagurattee,* 1 *Morl. Dig.* 335, is a decision in support of his position; and so in the *Daya Krama Sangraha,* ch. ii. sec. 3, par. 6, where the author is treating of the succession to the separate property of a woman received by her at her nuptials, he says—"On the death of a maiden daughter, or of one affianced, in whom the succession had vested, and who having been subsequently married, is ascertained to have been barren, or on the death of a widow who has not given birth to a son, the succession to the property which

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has passed from the mother to her daughter would devolve next on the sisters having and likely to have male issue, and in their default, on the barren and widowed daughters; not on the husband of such daughter above mentioned in whom the succession had vested: for the right of the husband is relative to the woman's separate property, and *wealth which has in this way passed from one to another can no longer be considered as the woman's separate property*," (see also ch. i. sec. 3, par. 3; ch. ii. sec. 2, par. 12, and the *Daya Bhaga*, ch. xi. sec. 2, par. 30.) Upon the authorities the question stands thus:—

In the *Mitacshara*, ch. ii. sec. 2, the commentator, *Vignaneswara*, first quotes the text of *Yajnavalkya*, "What was given to a woman by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition) is denominated a woman's property;" and then, in his commentary, enlarges the text by substituting for the words "any other separate acquisition," which in the original text would properly be construed to mean "any other *of the same kind*," these words, "and also property which she may have acquired by inheritance, purchase, partition, seizure or finding," which words are evidently taken from the text of *Gautama* quoted in par. 8 of chap. 1, sec. 1 of the *Mitacshara*, descriptive of the different methods of obtaining ownership. "An owner is by inheritance, purchase, partition, seizure, or finding." It is, so far as we have been able to ascertain, this commentary upon which the notion has been founded that property acquired by a woman by inheritance classes as stridhanam in Southern India. See *Sir T. Strange's Hindoo Law*, vol. 1, (edition 1830,) page 31.

It is, however, quite certain that all property which a woman derives by inheritance cannot be so classed, if it be meant thereby that the peculiar course of succession applicable to woman's special property is to be applied to it; for in Southern India as elsewhere the property which a widow inherits from her husband cannot so descend; nor, according to the case in this Court already mentioned, property inherited by a mother from her son. We may mention in passing that the passage of *Sir T. Strange's* work, which is supposed in the judgment in that case to have been accidentally omitted from *Mr Mayne's* edition, was in fact omitted by the author himself in the edition of 1830, a circumstance which strengthens the inference that he had seen reason to alter the opinion expressed in the edition of 1825 that property so inherited by the mother became her stridhanam. Finding then how narrow is the basis of authority upon which the proposition rests, and how clear and concurrent are all the other authorities, including even the *Smriti Chandrika* against it, we have arrived at the conclusion that according to Hindoo Law property acquired by inheritance is not to be classed as stridhanam in Southern India any more than in other

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parts of the country. It is unnecessary to consider whether as regards succession to a maternal estate except in cases otherwise expressly provided for, preference is to be given to daughters over sons, upon the principle referred to by *Mr Ellis*, (2 vol. *Sir T. Strange*, page 405,) that "sons shall succeed to the father and daughters to the mother;" and with reference to such text as that of *Narada*, "Let daughters divide their mothers' wealth; or on failure of daughters, their male issue;" or that of *Yajnavalkya*, "the daughters share the residue of their mother's property after payment of her debts."

In the present case, the only question is as to the right of the husband of a deceased daughter in preference to her surviving sister; and it seems clear that the husband can only be heir to his wife if the property be strictly her peculiar property.

But independently of this question, it appears to us that even if the property be assumed to have descended as stridhanam jointly to the two sisters, the survivor of the two would take the share of the deceased in preference to her husband.

We do not think that the question of division or non-division between the sisters was material, for though sisters or co-widows may divide, the division will not alter the course of succession as *Sir F. Macnaghten* (page 55) says, "Among sisters or co-widows; a division cannot be productive of more than convenience to the partitioning parties themselves; it will not give any one of them a right to dispose of her separate share or in any manner vary the rules of inheritance;" and as we held in a recent case where two widows having divided their joint estate, the next heirs of the deceased husband claimed to succeed to the share of the deceased widow in preference to the survivor.

But whether the sisters were divided or not divided, it seems to us that so long as there was a daughter living she was entitled to the mother's estate in preference to any other claimant; for it is only on failure of daughters that any other claimant can come in. The general rule of Hindoo law is that amongst co-heirs survivorship takes place; and *Sir F. Macnaghten* (*R.* 34) puts the case of three sisters succeeding jointly to their father's estate, and all dying childless or having daughters only; and he says that upon the death of one the two others would succeed to her share in equal proportions, and upon the death of one of these the whole estate would vest in the survivor for her life. See also *Borrodaile's Reports*, 91. The exceptions mentioned by *Mr Strange*, in sec. 237 of his *Manual*—viz., that the male issue of a man, *i.e.*, his sons, sons' sons, and sons' grandsons, must have been exhausted before his lapsed share falls to those in parallel grade to himself, and that daughters' sons must have been exhausted before the lapsed share of the daughter falls to other daughters, are to be explained on the ground that as the word "son" intends male issue down to the great-grandson, since he is equally a giver of

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funeral oblations, so does the term "daughter" comprehend the daughter's son, for he also is the giver of a funeral offering, as is expressed in the *Daya Bhaga*, chap. xi. sec. 2, par. 27. No such explanation is applicable to the case which we have to consider; and we do not see any ground for not applying the general rule.

It seems to us, therefore, that the plaintiff derived no title from the first defendant, and that the judgment of the Principal Sadr Amin must be reversed, and that of the District Munsiff confirmed.

This decision appears to have been passed after considerable reflection and research. Nevertheless, we regret that we are unable to concur in the conclusion at which the learned judge, who is distinguished for the careful consideration which he bestows upon his decisions, has arrived. At p. 224 we comment on the decision of the Madras High Court, in the case of *P. Bachiraja* v. *Venkatappadu*, published in vol. 2, p. 402, of the Reports of 1865, and at p. 283 we also express our sentiments on the view taken on the subject of Stridhana in the acse of *Jamiyatram* v. *Bai Jamna* by *Sir Joseph Arnould* of the Bombay High Court, published in 2 *Bomb. H. C. R.* 10.

The judgment of *Sir Adam Bittlestone* contains frequent reference to the authorities of the Bengal school, which differ essentially on the subject of *stridhana* from the school of Benares, the doctrines of which undoubtedly are the guiding principles governing the Dravada school followed in Madras presidency; consequently, we consider that where a difference of opinion exists between commentators acknowledging the same leading doctrines, reference must be made not only to the original authorities upon which the commentators profess to base their opinions, but also to indications afforded by the undoubted direction of the law itself. Now, if we look to the latter source, we find that the Hindoo law recognises but three descriptions of property, namely, ancestral, self-acquired, and woman's property, or stridhana. The books abound with directions respecting the mode of succession to and partition of ancestral and self-acquired property. With respect to these two descriptions of property little or no reference is made to the rights of females. Nowhere is it said, that property which comes into their possession shall be considered ancestral. The only property which women are held to be capable of possessing and transmitting to their heirs is known in Hindoo law as stridhanum. True, it may be said that when a widow succeeds to her sonless husband she takes but a limited life interest in his property. Whether this be the correct construction of the law or not is a moot point. Nevertheless, since this construction has been acted on in a series of decisions, it is unnecessary to consider its soundness or otherwise. Where a widow succeeds to such property we are willing to concede that she takes

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by an exceptional title; but, with the exception of property inherited from her husband, we are unable to discover any denomination, except stridhana, which can be applied to property possessed by a woman. *Sir A. Bittlestone* evidently laboured under some difficulty in assigning the property which formed the subject of the suit to any particular class.

We think that, as the suit originated in Madras, reference to Bengal authorities was unnecessary.

In dividing ancestral property no share is assigned to the daughter. But the law, nevertheless, considers a female as capable of possessing property free from the interference of her husband, subject during his lifetime, to his control and advice in the management and disposal of it. Whatever property a woman acquires is known as her separate property. *Yajnavalchya* defines this property to be, "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage by another wife, as also any other (separate acquisition) is denominated a woman's property," *Mitac.* ch. ii. s. xi. § 1. In the same manner does the author of the *Smriti Chandrika* render this passage of *Yajnavalchya*, ch. ix. s. i. § 3. In this section *Devanna Bhut*, the author of the *Smriti Chandrika*, does not express his own views of the meaning of the expression "any other (separate acquisition.") The description of property said not to be stridhana enumerated at p. 120 of the translation, such as "ornaments given to be worn on particular occasions, and property given to a woman with a view to defraud co-heirs," of course do not fall within *Yajnavalchya's* text. Probably the Hindoo legislators regarded the husband as entitled to the labours of his wife; and for this reason excluded wealth earned by a woman by mechanical arts from the category; why wealth received from friends or the like was likewise excluded we are unable to discover. But still our inability to assign a reason for the omission of such gifts from the list does not affect the construction of the words "any other (separate acquisition.") So far as the *Smriti Chandrika* is concerned, we find that that work cannot be regarded as an authority for the constructions of the words "any other (separate acquisition.") The *Mitac.* ch. ii. s. xi. § 2, construes these words to mean acquisition by inheritance, purchase, partition, seizure, or finding, and the learned judge properly remarks, the construction has reference to the text of *Gautama*, cited in ch. i. s. i. § 8, "An owner is by inheritance, purchase, partition, seizure, or finding." Here we have a construction of the words "any other (separate acquisition,") not of the commentator, but of a sage as highly reverenced as *Yajnavalchya* himself. We therefore do not consider that the sentence of the *Smriti Chandrika* commenting on the same text is sufficient authority to justify the conclusion arrived at.

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We do not clearly understand what object the learned judge had in view in referring to ch. xi. s. iii. § 8 of the *Smriti Chandrika* where the author discusses the question whether the father or mother should take priority in succeeding to a son's estate. This subject is certainly not connected with stridhana. The author arrives at the conclusion that the father is entitled to succeed; but what this has to do with stridhana we cannot discover. If it bears upon the subject at all, we should imagine that the words, "Whatever the mother takes, she takes for herself like the stridhana called *Adhyagni* and the like, and that for the benefit of both herself and her husband," rather support the conclusion that the mother might take the estate of the son if the father were not alive, and if so, she would take such estate as stridhana.

The learned judge gets over the difficulty, which, evidently from the laboured appearance of his judgment pressed upon him, by importing into the text of *Yajnavalchya* "any other (separate acquisition,") the words "any other of the same kind." But he has omitted to explain what kind can possibly be meant. A gift by a father, mother, husband, or brother. A gift received at the nuptial fire, or presented by her husband on her second marriage, are enumerated. What other of the same kind, if the learned judge be correct, could have been meant by "any other." Is it not more likely "any other" bracketed as "separate acquisition," may have meant property. If so, the text of *Gautama* aids the construction, which is supported by the spirit of the law, providing for the possession by women of separate and independent property.

Whatever weight may be due to opinions entertained by European writers, we are of opinion that their conclusions are entitled to no greater weight than the conclusions of Hindoo commentators. No doubt *Macnaghten* and *Strange* are as eminent in the track they have followed as *Davanna Bhut* and *Vignaneswara* were. All are alike commentators. But when they differ in opinion, we must be guided by the texts of the sages, and by the spirit of the law.

Wife or widow may alienate.—In *Kullammal* v. *Kuppu Pillai*, 1 *Mad. H. C. R.* p. 85, the High Court of Madras has held that a Hindoo wife or widow may alienate her *stridhana*, whether it be moveable or immoveable, with the exception perhaps of land given her by her husband, *ante*, p. 126. In a subsequent case, *Dantuluri Rayapparas* v. *Mallapudi Rayudu*, 2 *Mad. H. C. R.* p. 360, the same Court observes that they could not, without the greatest consideration, conclude that a woman can, without the consent of her husband during connexion, absolutely alienate even her own landed property.

Strange has the following enumeration, viz. :—

I. What is given to a young woman, or to her husband in trust for her at the time of her marriage, *i.e.*, during the space between

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the beginning and close of the nuptial ceremony, but not to be confined rigorously to the day, if given on account of the marriage.

II. Her fee, or what is given to her in the bridal procession upon the final ceremony, when the marriage is about to be consummated, as a bribe to induce her to repair more cheerfully to the mansion of her lord, *Jim. Vahana*, ch. iv. s. i. § 5; *ib.* s. iii. § 21; *Mitac.* ch. ii. s. xi. § 5; *Daya Krama Sangraha*, ch. ii. s. ii. § 8; *Vyasa*, 3 *Dig.* 370.

III. What is given to her on her arrival at her husband's house when she makes prostration to her parents.

IV. Gifts subsequent, by her parents or brothers.

V. Upon her husband proposing to take another wife, the gratuities given by him to reconcile the first to the supersession, the measure of which seems not to be settled, but supposed to be equal to the sum spent on the ceremony. See *ante*, p. 128.

VI. What a woman receives from the bridegroom on the marriage of her daughter.

VII. What she owes at any time to the good graces of her husband, as, for instance, a reward for performing well the business of the house in her department, called her perquisite.

VIII. Anything given her at any time by any of her relations, being specially given, which includes gifts made to her before marriage, while yet an unbetrothed member of her own family.

IX. The earnings of her industry, as by sewing, spinning, painting, and the like. These are the enumeration in the *Smriti Chandrika*. The 9th does not occur in the *Mitac.* nor in *Menu*, and *Jim. Vahana* and others exclude it, observing that the husband has a right to it independently of distress, *Mitac.* ch. ii. s. xi.; *Menu*, ch. ix. 194, ch. viii. § 416; *Jim. Vahana*, ch. iv. s. i. § 20; *Katyayana*, 3 *Dig.* 472, *et seq.*; *Narada*, 2 *ib.* 249; 1 *Stra. H. L.* 31, 50. Yet it seems admitted that her heirs, and not his, succeed to them after her death, she having survived him. The reason for the doubt as to their constituting *stridhana*, being, that it was sent by strangers, not a gift from her husband or any of her relatives, a circumstance belonging to the description of property in question, 3 *Dig.* 472, 495, *et seq.*; 3 *ib.* 628; 1 *Stra. H. L.* 31; 2 *ib.* 21.

X. What is given to a wife for sending, or to induce her to send, her husband to perform particular work, which by some is included, by others excluded, *Jim. Vahana*, ch. iv. s. iii. § 19, 20; 3 *Dig.* 568.

XI. Property which a woman may acquire by inheritance, purchase, or finding. What has been inherited by her being so classed by *Vijnyaneswara*, whose authority prevails in the peninsula, while it is otherwise considered by writers of the Eastern school, *Mitac.* ch. ii. s. ix. § 2; 3 *Dig.* 568, 627.

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XII. The savings of her maintenance, *Jim. Vahana*, ch. iv. s. i. § 15, and note; 3 *Dig.* 567; 1 *Stra. H. L.* 32.

BENGAL SCHOOL.—DIFFERENT DESCRIPTIONS OF STRIDHANA.—In the Bengal school *Jim. Vahana* cites *Vishnu*, who says, "What has been given to a woman by her father, her mother, her son, or her brother, what has been received by her before the nuptial fire, what has been presented to her on her husband's espousal of another wife, what has been given to her by kindred, as well as her perquisite, and a gift subsequent, are a woman's separate property," *Jim. Vahana*, ch. iv. s. i. § 1.

GIFT SUBSEQUENT.—*Katyayana* describes a gift subsequent, what has been received by a woman from her husband's family at a time posterior to her marriage, and so is that which has been similarly received after her nuptials either from her husband or from her parents through the affection of the giver, *Bhriyu*, *ib.* § 2.

By the word "kindred" her father and mother are denoted. Hence anything received subsequently to the marriage from paternal or maternal uncles, or other persons who are related through the father or the mother, or from the two parents themselves, or from the husband or his family, viz., father-in-law, and the rest. But the term "kindred" in the text of *Vishnu* intends maternal uncles, and others; for the father and the rest are specified by the appropriate terms, either the husband or the parents inherit that which was received at the time of the nuptials according to the difference between marriages denominated Brahma, &c., and those called Assoora, and so forth, *Jim. Vahana*, ch. iv. s. i. § 3.

Menu and *Katyayana* describe her separate property thus: "What was given before the nuptial fire, what was presented in the bridal procession, what has been conferred on the woman through affection, and what has been received from her brother, her mother, or father, are denominated the sixfold property of a woman," *Menu*, ch. ix. § 194; *Jim. Vahana*, *ib.* § 4; *Mitac.* ch. ii. s. xi. § 4; *Smriti Chandrika*, ch. ix. s. i. § 1. So *Narada* says, what was given before the nuptial fire, what was presented in the bridal procession, her husband's donation, and what has been given her by her brother or by either of her parents, *Jim. Vahana*, *ib.*

Katyayana defines "gift before the nuptial fire," and "gift presented in the bridal procession," and her husband's donation. See *Jim. Vahana*, ch. iv. s. i. § 5–8.

Wealth given her by her husband she may dispose of as she pleases when he is dead; but while he is alive she should carefully preserve it. This is intended as a caution against profusion, *ib.* ch. iv. s. i. § 9.

That wealth which is given to gratify a first wife, by a man desirous of marrying a second, is a gift on second marriage, for its object is to obtain another wife with the assent of the first, *ib.* § 14.

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Devala says, Her subsistence, her ornaments, her perquisite, and her gains, are the separate property of a woman. She herself exclusively enjoys it, and her husband has no right to use it except in distress, *ib.* § 15.

Vyasa says, Whatever is presented at the time of the nuptials to the bridegroom, intending the benefit of the bride, belongs entirely to her, and shall not be shared by kinsmen, *ib.* § 16.

The number of six sorts is not restrictive, whatever is at her sole disposal is a woman's peculiar property, *ib.* § 18.

WEALTH EARNED BY MECHANICAL ARTS.—*Katyayana* expresses this rather concisely, "The wealth which is earned by mechanical arts, or which is received through affection from any other (but the kindred) is always subject to her husband's dominion. The rest is pronounced to be the woman's property," *ib.* § 19.

And wealth received in presents from any other but father, mother, or husband, and wealth earned by the wife in the practice of a mechanical art, as spinning or weaving, her husband has control over. He has a right to take it even though no distress exist. Hence, though the goods be hers, they do not constitute woman's property, because she has not independent power over them, *ib.* § 20.

But in other descriptions of property, excepting those two, the woman has the sole power of gift, sale, or other alienation. So *Katyayna* declares, That which is received by a married woman, or a maiden in the house of her husband, or of her father, from her husband, or from her parents, is termed the gift of affectionate kindred. The independence of women who have received such gifts is recognised in regard to that property, for it was given by their kinsmen to soothe them, and for their maintenance. The power of women over gifts of their affectionate kindred is ever celebrated both in respect of donation and of sale according to their pleasure, even in the case of immoveables, *ib.* § 21. See 1 *Mad. H. C. R.* 87, *ante*, p. 126, 183; 1 *Stra. H. L.* 28; 1 *Morl. Dig.* 259.

BUT IN THE CASE OF IMMOVEABLES BESTOWED ON HER BY HER HUSBAND.—So *Narada* declares, What has been given by an affectionate husband to his wife she may consume as she pleases when he is dead, or may give it away, excepting immoveable property.* It follows, from the specific mention of given by a husband, that any other immoveable property, except such as has been given to her by him, may be aliened by her; else (if this text forbid donation in the case of immoveables in general) the preceding passage concerning the power of women in respect of donation and of sale according to their pleasure, even in the case of immoveables, would be contradicted, *ib.* § 23.

WHERE TAKEN BY HUSBAND IN CASE OF DISTRESS.—*Yajnavalchya*,

* Not found in *Narada's Institutes*, but cited in *Mitacshara* and *Ratnakara*.

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2, 148, declares, a husband is not bound to make good the property of his wife taken by him in a famine, or for the performance of a duty, or during illness, or while under restraint.

Katyayana denies the right of the husband to do so in any other circumstances, Neither the husband, nor the son, nor the father, nor the brothers can assume the power over a woman's property, to take it, or bestow it. If any one of these persons consume by force the woman's property he shall be compelled to make it good with interest, and shall also incur a fine. If such person, having obtained her consent, use the property amicably, he shall be required to pay the principal when he becomes rich. But if the husband have a second wife, and do not show honour to his first wife, he shall be compelled by force to restore her property, though amicably lent to him. If food, raiment, and dwelling be withheld from the woman she may exact her due supply, and take a share (of the estate) with the coheirs, *ib.* § 24.

If the husband, having taken the property of his wife, live with another wife and neglect her, he shall be compelled to restore the property taken by him. If he do not give her food, raiment, and the like, that also may be exacted from him by the woman, *ib.* § 25.

Thus a definition of women's property has been propounded, *Jim. Vahana*, *ib.* § 26.

STRIDHANA—WHAT GIFTS FROM STRANGERS—SELF-ACQUISITIONS.—The different acquisitions included in *stridhana* may for all practical purposes be included in gifts or the like from her husband or kindred before, during, or after her marriage. Gifts to a married woman from a *stranger*, that is to say, from other persons than her husband and kindred, and *not* made at the time of her marriage, belong to the husband's estate, and are considered as *his* property, and so are all her acquisitions by the practice of any mechanical art, as spinning, weaving, or the like; but what she acquires by her own exertions in a state of widowhood belongs of course to her own property, *Elberling*, 84; *Menu*, ch. ix. § 194; *Daya Krama Sangraha*, ch. ii. s. ii. § 16; *Daya Bhaga*, ch. iv. s. 1; *Mitac.* ch. ii. s. xi.; 1 *Macn. Prins. H. L.* 37.

ORNAMENTS WORN BY THE WIFE.—During her husband's lifetime, and not distinctly given to her by her husband, are not considered her property as long as he lives, but become so at his death if she survives him, and are afterwards inherited as *stridhana*, *Elberling* 84; *Mitac.* ch. ii. s. xi. § 33.

BOMBAY SCHOOL—DIFFERENT KINDS OF STRIDHANA.—The sources of a woman's property are six. *Menu*, "What was given before the nuptial fire; what was presented in the bridal procession; what was given in token of love; what was received by her from her brother, her mother, or her father, are denominated the six-fold property of a woman," ch. ix. § 194; *Mayukha*, ch. iv. s. x. § 1; *Jim. Vahana*, ch. iv. s. 1, § 1; *Mitac.*, ch. ii. s. xi. § 1, 2.

What has been given to women at the time of their marriage,

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near the nuptial fire, is celebrated by the wise as woman's property bestowed before the nuptial fire. That again which a woman receives whilst she is conducted from her father's house to her husband's dwelling, is instanced as the property of a woman under the name of a gift presented in the bridal procession. What has been given to her through affection by her mother-in-law, or by her father-in-law, or has been offered to her as a token of respect, is denominated an affectionate present. What has been received at a time subsequent to her marriage, from the family of her husband, is called a gift subsequent, and so is that which has been similarly received from her own family. What has been received as the value of household utensils, of beasts of burden, of milch cattle, or ornaments of dress, or for work, is called her perquisite. The meaning is, when the bride does not (as usual) obtain household utensils and the rest, then whatsoever is given to her at the time of her marriage, as the price of them, is termed her perquisite. What she receives on her supersession is explained, see *ante*, p. 13, 128, *post*, p. 200.

That which a husband has promised for separate property, (stridhana,) must be made good by his sons as a debt, *Devala*.

THE NATURE AND AMOUNT OF A WOMAN'S SEPARATE PROPERTY.—On the subject of giving property to women, *Katyayana* declares separate property, except immoveables, is to be given to women by their father, mother, husband, brother, according to their means, as far as 2000. "The wealth to be given excludes immoveable property, and must not exceed 2000 panas," *Madana. Vyasa.* If they are able, even immoveable property may be given, *Madana.*

But in property given to a woman with a view of cheating the heirs out of it, as well as ornaments, or the like, given to her merely for the purpose of wearing, a woman has no ownership or property, for thus says *Katyayana*, "But whatever has been given to a woman with a fraudulent design, as well as entrusted to her for use by her father, brother, or husband, is declared not to be woman's property," (*stridhana.*)

WOMEN HAVE NO ABSOLUTE PROPERTY IN THEIR EARNINGS, OR IN ANYTHING BUT STRIDHANA.—In what they have earned by the arts, or obtained from friends, or those distinct from parents, or the rest, women have no property; for thus says the same author, "The wealth which is earned by mechanical arts, or which is received through affection, from any other but the kindred, is always subject to her husband's dominion. The rest is pronounced to be woman's property." However, though a text, *Menu*, ch. viii. § 416, says, "A wife, a son, and a slave are in general incapable of property, the wealth which they may earn is regularly acquired for the man to whom they belong," it also relates only to wealth earned by mechanical arts and the like. It is, moreover, agreeable to reason, to refer this also to their not having absolute dominion in wealth, received on their supersession and the like, *Mayukha*, ch. iv. s. x. § 7

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IN SOME KINDS THEY POSSESS ABSOLUTE PROPERTY. — Again, *Menu* says, " A woman should never make expenditure from the goods of her kindred (which are) common to (her and) many; or even from the property of her lord without his consent," ch. ix. § 190. (Expenditure is disbursement); yet, in some kinds of wealth, they are declared to possess sole property by *Katyayana*: "That which is received by a married woman, or a maiden, in the house of her husband or of her father, from her brother or from her parents, is termed the gift of affectionate kindred. The independence of women who have received such gifts is recognised in regard to that property, for it was given by their kindred to soothe them and for their maintenance. The power of women over the gift of their affectionate kindred is ever celebrated in respect of donation, and of sale according to their pleasure, even in case of immoveables," *Mayukha*, ch. iv. s. x. § 8, *ante*, 126.

BUT NOT IN IMMOVEABLE PROPERTY GIVEN BY THEIR HUSBANDS.— But over immoveable property given them by their husbands, they do not possess full power from this text of *Narada:* "What has been given by an affectionate husband to his wife, she may consume as she pleases when he is dead, or may give it away, excepting immoveable property," *Mayukha*, ch. iv. s. x. § 9; see *Doe de Kullamma* v. *Kuppu Pillai*, 1 *Mad. H. C. R.*, 85, 88, 90, *ante*, p. 183.

HUSBANDS AND OTHERS DO NOT POSSESS ABSOLUTE POWER OVER WOMEN'S PROPERTY.—The non-existence of absolute power in husbands and the rest over women's property is declared by the same author: "Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property, to take it or bestow it. If any of these persons by force consume the woman's property, he shall be compelled to make it good with interest, and shall also incur a fine. If such person, having obtained her consent, use the property amicably, he shall be required to pay the principal when he becomes rich." *Menu:* "Such kinsmen (as by any pretence) appropriate the fortunes of women during their lives, a just king must punish with the severity due to thieves," ch. viii. § 29, ch. ix. § 200. Such ornamental apparel as women wear during the lives of their husbands, the heirs of the husband shall not divide amongst themselves; they who do so are degraded from their tribe, " *Wear*, meaning things worn by them which have been given to them for the purpose by their husbands or the others," *Devala*. "Her maintenance, ornaments, perquisite, and gain, are the separate property of a woman; she herself exclusively enjoys it and her husband has no right to it, except in distress. If he let it go on a false consideration or consume it, he must repay the value to the woman with interest; but he may use the property of his wife to relieve a distressed son." *Maintenance* is wealth given her by her father or the others for the purpose of subsistence. *Gain* is interest (or profit). "To let go, get rid of, and give away," have all the same

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meaning in this place. The word "son" is here used in its general sense for any member of the family. "A husband is not liable to make good the property of his wife taken by him in a famine or for the performance of some religious duty, or during illness, or while under restraint." Here, by using the husband alone, it is virtually declared that woman's private property must not be taken by any other but him, even when distressed by famine or other calamity; "religious duties," such as are indispensable; "under restraint," in prison. *Mayukha*, ch. iv. s. x. § 10.

A HUSBAND IN SUCH CASE MAY BE COMPELLED TO RESTORE IT.—In some cases a husband, though unwilling, may be compelled to restore it; for, says *Devala*, But if the husband have a second wife and do not show honour to his first wife, he shall be compelled by force to restore her property though amicably lent to him. If suitable food, raiment, and dwelling be withheld from the woman, she may exact her own property and take a share (of the estate) with the co-heirs "that is at their hands," *Mayukha*, ch. iv. s. x. § 11.

This, however, relates to a virtuous wife, for a wicked one should receive no portion. Accordingly, the same author says, "But a wife who does malicious acts injurious to her husband, who acts improperly, who destroys his effects or who takes delight in being faithless to his bed, is held unworthy of separate property;" and again, "wealth was conferred for the purpose of defraying sacrifices, therefore distribute wealth amongst honest persons, not amongst women, ignorant men, or such as neglect their duties," *Mayukha*, ch. iv. s. x. § 12.

MITHILA SCHOOL—DIFFERENT KINDS OF STRIDHANA.—*Menu* and *Katyayana*, "There are six kinds of property of a woman," the same as those described in the Bengal, Madras, and Bombay schools. There cannot be a less number, *Vivada Chintamani*, 256.

Katyayana explains what is property given before the nuptial fire. Property of a woman given at her nuptial procession: wealth gained by amiability; *ib.* 256, 257.

What a woman receives for her consolation when her husband takes a second wife is the seventh kind of peculiar property, *ib.* 157.

Yajnavalchya: A woman whose husband takes a second wife, shall have compensation for the supersession if no property have been bestowed upon her; but if any have been given they shall get so much as will make her share equal to that of the new bride. *ib.* 258.

Vishnu says:—The property of a female is what her father, mother, son, or brother has given her; what she received before the nuptial fire, *or at the bridal procession;* or when her husband took a second wife; what her husband agrees should be regarded as her perquisites; what is received from his or her kinsmen as a gift subsequent to the marriage, *ib.* 258.

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The latter *Katayana* explains as the small sums which are received by a woman as the price or rewards of household duties, using household utensils, tending beasts of burden, looking after milch cattle, taking care of ornaments of dress, or superintending servants are called her perquisites.

Explanation.—What the master of the house, pleased with the performance of the household business, gives to a woman is her perquisite. What is a gift subsequent is also explained, *ib.*

The peculiar property of women is thus explained.

Saudayika is the name by which the different kinds of the peculiar property of women are known.

Katyayana says :—"That which is received by a married woman or a maiden in the house of her husband or father, from her brothers or from her parents, is termed the gift of affectionate kindred." By the words *her husband*, are to be also understood his kindred.

Hence the meaning is, what a married woman or maiden receives from her parents or their kindred is called the gift of affectionate kindred, *ib.* 259. The means of subsistence and other kinds of women's property will be described hereafter, *ib.*

How it is to be used.—*Katyayana* says, "The independence of women who have received such gifts is recognised in regard to that property," for it was received through the kindness of the donors. "The power of women over the gifts of affectionate kindred is ever celebrated, both in respect of donation and sale at their pleasure, even in the case of immoveables," *ib.* 260. Women are competent to make gifts and so forth of the immoveables given by their husband's kindred, *ib.*

Apastamba thus speaks of the gifts of affectionate kindred :— "Ornaments are the exclusive property of a wife, and so is wealth given her by kinsmen or friends; according to some legislators, given by kinsmen, means that which is given at the time of marriage and so forth, by kinsmen and the kinsmen of her parents, or those of her husband," *ib.* 260.

Ornamental apparel worn by women during the lives of their husbands cannot be taken by the heirs of the latter. They who divide it among themselves fall into deep sin, *Menu, Vishnu. Chintamani*, p. 260.

Ornaments worn with consent of the husband.—Any ornament worn with consent of the husband shall be the woman's peculiar property, even if it have not been given to her. *Madhatithi* declares that, according to the foregoing text of *Katyayana* a woman is competent to give away or sell any immoveable or moveable property which she has received from her husband's kindred, *ib.*

What property may be enjoyed by a woman at pleasure after her husband's death.—*Narada* says, Property given to her by her husband, through pure affection, she may enjoy at her

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pleasure after his death, or give away, with the exception of lands or houses.

Explanation.—Consequently a woman can dispose of moveable property which has been given her by her husband, but she can never dispose of immoveable property. The same rule holds good in the case of *Saudayica,* or the gifts of affectionate kindred, *ib.* 261, *ante*, pp. 126, 127.

HOW A WOMAN, ON THE DEATH OF HER HUSBAND, MAY ENJOY HIS ESTATE, AND WHERE SHE IS TO LIVE.—*Katyayana* says, "That a woman, on the death of her husband, may enjoy his estate according to her pleasure; but in his lifetime she should carefully preserve it. If he leave no estate, let her remain with his family," *ib.*

A CHILDLESS CHASTE WIDOW SHALL, DURING HER LIFE, ENJOY HER HUSBAND'S PROPERTY.—A childless widow, preserving her chastity, shall enjoy her husband's property with moderation as long as she lives. After her death the heirs shall take it, *ib.* 261.

This admits of two meanings. The one is, that on the death of the husband, his property devolves on his wife, and becomes her own in default of other heirs.

The other is, that the property, which she enjoys with the consent of her husband in his lifetime, is to be regarded as her peculiar property. *Katyayana* says, as to the first of these, "Let a woman, on the death of her husband, enjoy her husband's property at her discretion." This refers to property other than immoveable, *Chintamani*, p. 262.

HOW A WOMAN SHALL ENJOY IMMOVEABLE PROPERTY.—The following provision is made for immoveable property. Let a woman enjoy it as long as she lives. After her death let the heirs take it.

Explanation.—"Moderation" means without much expenditure. "Childless widow" means who has no heir of her own.

THE PROPERTY PROTECTED IN THE LIFETIME OF HER HUSBAND.—On the second, it is said that, "while he lives she should carefully preserve it;" or, in other words, the property should be protected in the lifetime of the husband. If her husband have left no wealth, the widow shall live with his family, *ib.* 262.

ALIENATION—IMMOVEABLE PROPERTY CANNOT BE DISPOSED OF BY THE WIDOW AT HER PLEASURE.—Hence the immoveable property which a woman gets after the death of her husband, cannot be disposed of at her pleasure, *ib.*

Explanation.—The meaning of this is consonant with that of the husband's donation, (which can only be enjoyed, but not spent.)

The texts of *Katyayana* do not refer to the peculiar property of a woman. The inconsistency owing to this is removed by the similarity of meaning, *ib.*

As a woman cannot make a present of or at pleasure dispose of

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immoveable property given to her by her husband in his lifetime, so she cannot dispose of any immoveable property which she inherits on his death. The same opinion is maintained in the *Ratnakara* and the *Prakasakara, ib.* 163, *ante,* pp. 126, 128.

NOR THE IMMOVEABLE PROPERTY INHETITED FROM HER SON.—If the mother on the death of her son get his immoveable property, she cannot make a gift of it or dispose of it at her pleasure, *ib.* 263. *Devala* says, as to the property in question : —" Food and vesture, ornaments and perquisites, and wealth, received by a woman *from a kinsman,* are her own property ; she may enjoy it herself, and her husband has no right to it except in extreme distress."

Explanation.—" Food and vesture" mean, " funds appropriated to her support ;" "ornaments" mean, " ornamental apparel ;" " perquisites" mean, " wealth given to a damsel on demanding her in marriage ;" " wealth received" mean, " that which is received from kinsmen."

These are the several kinds of the peculiar property of women, *ib.* 263.

THE PROPERTY OF A WOMAN SHOULD NOT BE USED, BUT FOR THE RELIEF OF A DISTRESSED SON.—If the husband give it away on a false consideration, or consume it, he must make good the value to the woman, with interest, but he may use the property of his wife to relieve a distressed son.

Explanation.—The property of a woman should not be improperly given away or consumed without her consent, but it might be used for a distressed son. It has been declared by the same writer, (*Devala,*) that the husband has power to use it with or without the consent of his wife, *ib.* 264.

WHEN THE HUSBAND SHALL PAY THE PRINCIPAL ONLY.—If the husband " having obtained her consent, use the property amicably, he shall be required to pay the principal when he becomes rich."

IF THE WIFE GIVE THE PROPERTY TO HER HUSBAND IN DISTRESS. —If the wife give her peculiar property through affection when her husband is ill, or is in danger, or has been confined by a creditor, he may give her the value of it when he pleases.

Explanation.—The meaning of the above is, that if the wife, observing her husband's illness, or the like, give her wealth, it may be repaid by him at pleasure, *ib.*

WHEN THE HUSBAND IS NOT LIABLE TO MAKE GOOD THE PROPERTY TAKEN FROM HIS WIFE.—*Yajnavalchya* says that " a husband is not liable to make good the property of his wife taken by him in a famine, or for the performance of a duty, or during illness, or while under restraint." *ib.*

Explanation.—While under restraint signifies, while he is so ill that he cannot work, *ib.*

WHEN MONEY TAKEN FROM HIS WIFE IS NOT TO BE REPAID BY A MAN.—*Katayana* specially declares that money taken by a man from his wife for performing some imperative duty when he has

no means of doing so, shall not be repaid. But if the husband has taken a second wife, and no longer gives his first wife the honour due to her, the king shall compel him, by violence, to restore her property, though it was put amicably into his hands, *Chintamani*, 265.

WHEN A WIFE CAN FORCIBLY TAKE HER OWN PROPERTY.—"If suitable food, apparel, and habitation, cease to be provided for a wife, she may by force take her own property, and a just allotment for such a provision, or she may, if he die, take it from his heir," *ib.*

"This a law of *Likhita*, but after receiving *her own property and a just allotment*, she must reside with the family of her husband; yet if afflicted by disease, and in danger of her life, she may go to her own kindred," *ib.*

A BAD WIFE IS UNWORTHY OF PECULIAR PROPERTY.—"But a wife who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, or who takes delight in faithlessness to his bed, is held unworthy of the property before described," *ib.* 265.

Anything promised to a woman by her husband as her exclusive property, must be given by the sons as a debt of his, provided she remain with the family of her husband. It is not to be given if she live with the family of her father, *ib.*

WHAT IS MEANT BY HONOUR DUE TO HER.—This means that if the husband do not visit her after the time of her *menses*, and do not provide her with food and raiment, the wife has the right to demand her peculiar property from her husband, though it has been given to him at the time of his sickness, or under similar circumstances.

Explanation.—"After receiving," &c. Even if she receive her own property and allotments, she must reside with the family of her husband, and not go to the family of her father, *ib.* 266.

"Who does malicious acts, injurious," &c. This shows that the kindred should demand the peculiar property from such a woman.

SECTION II.

ORDER OF DESCENT OF WOMAN'S PROPERTY.

MADRAS AND BENARES SCHOOL.—*Property inherited by a daughter as her mother's stridhun—Property acquired as her own stridhana—Distribution of woman's property—Her kinsmen take it if she die without issue—The heirs are different according to the form of marriage ceremony as shown by* Yajnavalchya—*Present on second marriage.*

IN BENGAL.—*Descent of stridhana—Where deceased was unmarried—Succession to the peculiar property of a maiden—Bridegroom*

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entitled to receive back his gifts—When given to her by her father —If not given to her by her father—Succession of a woman's children to her separate property—Passages apparently contradictory of the daughter's succession in exclusion of the son relate to wealth received by the mother at her nuptials—It is right that the son should inherit before the daughter's son—Property goes to unaffianced daughters—If none, to betrothed—Where married in the form of Brahma, &c. —If married according to Assoora—Succession to separate property of childless widow—Presents given to her when a maiden—Explanation of fee or perquisite—On failure of the above mentioned heirs collaterals succeed — Daughter's son succeeds on failure of the daughter and of male issue—Order of succession to the separate property of a childless woman—According to Elberling*—Property inherited as widow, daughter, mother, and grandmother—Property taken by a childless wife on a partition by husband, or by mother on partition by husband, or by mother among sons—Property inherited by a daughter as her mother's stridhana.*

BOMBAY SCHOOL.—*Successors to married woman's property—Arguments against the reciprocal rights of sons and daughters—Amongst daughters the unmarried are first sharers with sons—All property acquired by marriage the daughter, not the son, takes—Distribution where wives of different classes—Among their daughters and among their sons, is according to mothers—On failure of daughters and their issue—The right of daughters and their issue confined to the six kinds of property—Woman's property is an exception to the general right of sons—In default of offspring kinsmen succeed—The right of kinsmen depends on the form of marriage—The effects of those rights is different in the various classes—Heirs of a woman on failure of her husband and parents defined—The son in that case inherits presents from kindred—And the brother gets her perquisite—Gifts to be restored to the bridegroom when bride dies before marriage, deducting charges—Presents by maternal kindred belong to the brothers of the deceased damsel.*

IN MITHILA.—*How a woman's property is to be divided—Explanation — Her children — Who receive a woman's separate property—Explanation—Daughter shall receive a share from the maternal estate—Single daughters inherit nuptial gifts—Yautaka —Who receive residue of mother's property after payment of the debts—Where the rule is applicable—Who succeed on failure of daughters—Married sisters share with kinsmen—They shall receive something from the estate given by kindred—Descends according to the form of marriage—Explanation—Who, according to* Gautama, *shall get the sister's fee — Where this text applies —Who shall take the wealth of a deceased damsel—Order of succession to the peculiar property of women—Stridhana—How far heritable—Who may inherit—Daughters' daughters represent their mothers — Unmarried exclude married — Co-wife's children — Sister's son—Heirs of the separate property of the deceased proprietress.*

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ORDER OF SUCCESSION TO STRIDHANA VARIES.—The succession to *stridhana* varies according to the condition of the woman, and the means by which she became possessed of the property, *Elberling* 84. If deceased is a maiden, the heirs are—

Her brother.

Her mother.

Her father.

Her nearest kindred, but that which has been given by a bridegroom to her is to be returned to him, *Daya Krama Sangraha* ch. ii. s. xi. § 1; on paying the charges on both sides, *Mitac.* ch. ii. s. xi. § 29.

If married, and the property was given to her at the time of her nuptials, her heirs are—

Daughters.

Maiden.

Betrothed.

Married, who has, or is likely to have male issue.

Barren and

Widowed collectively.

After the death of a maiden, a betrothed daughter on whom the inheritance *had devolved*, and who proved barren, or on the death of a widow who has not given birth to a son, the succession to the property which they had so inherited will devolve next on the sisters having, and likely to have, male issue, and in their default, on the barren and widowed daughters. The daughter of a contemporary wife is also admitted, *Mitac.* ch. ii. s. xi. § 22; 2 *Macn. Prins. H. L.* 68.

The son.

The grandson's son.

The son's grandson.

The son of a contemporary wife.

Her grandson and

Great grandson.

In default of those descendants, supposing the marriage to have been celebrated according to any of the five first forms, *Brahma*, &c., the succession goes to

The husband.

The brother.

The mother.

The father.

If according to the *Assoora*, &c., the succession goes to

The mother.

The father.

The brother.

The husband.

In default of those the heirs are successively as follows:—

The husband's younger brother.

The husband's brother's son.

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The sister's son.
The husband's sister's son.
The brother's son.
The son-in-law.
The father-in-law.
The husband's elder brother.
Sapinda.

Saculyas, failing them the property of a Brahmini will go to learned Brahmans of the same village, and of other castes to the ruling power.

According to the Benares and Mithila schools, the unmarried daughter is preferred to the married, the indigent to the wealthy, *Mitac.* ch. ii. s. xi. § 13; ch. i. s. iii. § 11; so, according to the same schools, the daughter's daughter succeeds on failure of daughters, *Mitac.* ch. ii. s. xi. § 12, 15, and takes by representation, ch. ii. s. xi. § 16. See also *Menu*, ch. ix. § 193; then the daughter's son, *ib.* ch. ii. s. xi. § 18; then the son. The daughter's daughter gets no share according to the Bengal school. But it is fit, says *Menu*, that something should be given to her, *Elberling*, 86.

IF MARRIED, AND THE PROPERTY WAS NOT GIVEN AT THE TIME OF NUPTIALS.—When the deceased was married, and the property was not given to her at the time of her nuptials. If given by her father, the order is the same as in the case of property received at nuptials, *Daya Krama Sangraha*, ch. ii. s. v; *Daya Bhaga*, ch. iv. sec. ii. § 16. If not given by her father, the order is the following:—The son and unmarried daughter together, on the death of either of them, the property goes to the other (as with daughters).

The married daughters who have, or are likely to have, male issue.
The son's son.
The daughter's son.
The son's grandson.
The son of a contemporary wife; failing her,
Her grandson and
Son's grandson.
The barren and widowed daughters together.
Failing them the succession continues in the order as above, viz.,
The husband.
The brother.
The mother.
The father.

Raganundana holds that the husband alone has a right to the property of his wife dying without issue, bestowed on her by him after marriage, and that the brother has in such case the prior right to the property which may have been given to her by her father and mother, *Macn. Prins H. L.* 40.

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Having given this concise general outline of the order of succession, we shall now proceed to treat of the law of each school separately, and at greater length.

MADRAS AND BENARES SCHOOLS.—PROPERTY INHERITED BY A DAUGHTER AS HER MOTHER'S STRIDHUN—Goes to her heirs in the same order of succession as for males, because this acquisition is not by law included in what is termed *stridhun*. The sons will thus inherit this property in preference to daughters, and a brother in preference to a childless widowed daughter. According to Benares and Mithila schools, such property is considered as *stridhun*, and inherited as such, *Mitac.* ch. ii. s. xi. See *ante*, p. 176, *post*, p. 217.

PROPERTY ACQUIRED AS HER OWN STRIDHUN.—Property received as gifts or the like from her husband or kindred before, during, or after her marriage, and termed by the law stridhun, goes to her heirs, in an order which differs from the order of succession to other property.

DISTRIBUTION OF WOMAN'S PROPERTY.—Her kinsmen take it if she die without issue. If a woman die without issue—*i.e.*, leaving no progeny—in other words, having no daughter nor daughter's son, nor son, nor son's son—the woman's property as above described shall be taken by her kinsmen, namely, her husband and the rest, *Mitac.* ch. ii. s. xi. § 9.

THE HEIRS ARE DIFFERENT ACCORDING TO THE FORM OF MARRIAGE CEREMONY, AS SHOWN BY YAJNAVALCHYA.—The kinsmen have been declared generally to be competent to succeed to a woman's property. That of a childless woman married in the form denominated Brahma, or in any of the four unblamed modes of marriage, goes to her husband; but if she leave progeny, it will go to her (daughter's) daughters; and in other forms of marriage, as the Assoora, &c., it goes to her father and mother on failure of her own issue, *Mitac.* ch. ii. s. xi. § 10.

Of a woman dying without issue, and who had become a wife by any of the four forms of marriage denominated Brahma, &c., the whole property as before described belongs in the first place to her husband. On failure of him, it goes to his nearest kinsmen, sapinda, allied by funeral oblations. But in the other forms of marriage called Assoora, the property of a childless woman goes to her parents —that is, to her father and mother. The succession devolves first on the mother, after her on the father; failing them, their next of kin, *Mitac.* ch. ii. s. xi. § 11.

In all forms of marriage if the woman leave progeny, *i.e.*, if she have issue, her property devolves on her daughters, including granddaughters; the daughters share the residue of the mother's property after payment of her debts, *Yajnavalchya*, 2, 118; *ib.* § 12.

Hence, if the mother be dead, the succession devolves upon the Daughters.—First, the unmarried; on failure of them the married daughters. On failure of them, the unendowed; then those who are endowed. Thus *Gautama* says, "A woman's property goes to her daughter, unmarried, or unprovided, or provided."

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But this rule for the daughter's succession to the mother's goods, is exclusive of the fee, or gratuity, for that goes to brothers of the whole blood conformably with the text of *Guatama*. The sister's fee belongs to the uterine brothers after the death of the mother, *Mitac.* ch. ii. s. xi. § 14.

On failure of all the daughters,

Granddaughters in the female line. If there be a multitude of these, (granddaughters,) children of different mothers, and unequal in number, shares should be allotted to them through their mothers as directed by *Gautama;* or the partition may be according to the mothers, *Mitac.* ch. ii., s. xi. § 16.

But if there be daughters, as well as daughters' daughters, a trifle only is to be given to the granddaughters, *Menu.* ch. ix. § 193; *Mitac.* ch. ii. s. xi. § 17.

On failure also of daughters' daughters the succession devolves on (*Narada,* 13, 1; *Mitac. ib.* § 18)

Daughters' sons. If there be no grandsons in the female line, the succession devolves on

Sons, for the male issue succeeds in their default. When the mother is dead let all the uterine brothers and uterine sisters equally divide the maternal estate, *Menu.* ch. ix. s. 192; *Mitac.* ch. ii. s. xi. § 19. Brothers and sisters do not share together, but successively, *ib.* § 20.

Step-daughter.—The step-daughter may inherit, if she be of a superior tribe. The wealth of a woman, which has been in any manner given to her by her father, let the Brahmini damsel take, or let it belong to her offspring, *Menu,* ch. ix. § 198; *Mitac,* ch. ii. s. xi. § 22. The mention of Brahmini includes any superior class. Hence the daughter of kshetriya wife takes the goods of a childless vaicya, and the daughter of a Brahmini, kshetriya, or vaicya inherits the property of a soodra, *ib.* § 23.

On failure of sons, the paternal grandmother's wealth devolves on

Grandsons.—For *Gautama* says, "They who share the inheritance must pay the debts, and the grandsons are bound to discharge the debts of their paternal grandmother, for debts must be paid by sons and sons' sons, *ib.* § 24.

On failure of grandsons, the successors are the

Husband and other heirs.—Should a damsel, anyhow affianced, die before the completion of the marriage, let the bridegroom take back the gifts which he had presented, paying, however, the charges on both sides, *ib.* § 29.

If a betrothed damsel die, the bridegroom shall take the rings and other presents, or the nuptial gratuity which had been given by him to the bride, paying, however, the charges on both sides—*i.e.*, clearing or discharging the expense which has been incurred, both by the person who gave the damsel and by himself, he may take the residue. But her uterine brothers shall have the ornaments for the head and other gifts which may have been presented to the maiden by her maternal grandfather (or her paternal uncle or other relations), as well as the property which may have been regularly inherited by her. For *Baudhayana* says, "The wealth of a deceased damsel let the uterine brethren themselves take. On failure of them it shall belong to the mother; or, if she be dead, to the father," *Yajnavalchya,* 2, 148; *Mitac.* ch. ii. s. xi. § 30. A husband in distress, &c., using his wife's property, is not liable to make it good, *Mitac.* ch. ii. s. xi. § 31. In

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a famine, for the preservation of the family, or at a time when a religious duty must indispensably be performed, or in illness or during restraint or confinement in prison, or under corporal penalties, the husband being destitute of other funds, and therefore taking his wife's property, is not liable to restore it. But if he seize it in any other manner, or under other circumstances, he must make it good, *ib.* § 32.

The property of a woman must not be taken in her lifetime by any other kinsman or heir but her husband, *ib.* § 33.

PRESENT ON SECOND MARRIAGE.—A present made on her husband's marriage to another wife has been mentioned as a woman's property. "To a woman whose husband marries a second wife let him give an equal sum, (as a compensation,) for the supersession, see *ante*, pp. 13, 128, provided no separate property have been given her, but if any have been assigned let him allot half, *Yajnavalchya*, 2, 149; *Mitac.* ch. ii. s. xi. § 334.

SHE IS SAID TO BE SUPERSEDED, OVER WHOM A SECOND MARRIAGE IS CONTRACTED.—To a wife so superseded, as much should be given on account of the supersession as is expended in jewels and ornaments or the like, for the second marriage, provided separate property had not been given her by her husband or by her father-in-law. But if such property had been already bestowed on her, half the sum expended on the second marriage should be given. Here the word half does not intend an exact moiety. So much, therefore, should be paid as will make the wealth already conferred on her equal to the prescribed amount of compensation, *Mitac.* ch. ii. s. ii. § 35, *ante*, pp. 13, 128.

BENGAL SCHOOL—DESCENT OF STRIDHANA.—Stridhana which has once devolved according to the law of succession, which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance. Thus the property given to a woman on her marriage is *stridhana*, and at her death passes to her daughter; upon the daughter's death it passes to the heir of the daughter like other property, and the brother of her mother would be heir in preference to her own daughter if she were a widow without issue, 1 *Macn. Prins. H. L.* 38.

WHERE DECEASED WAS UNMARRIED.—So property left to an unmarried woman is inherited by her brother, her father, and her mother successively, and failing these, her paternal kinsmen in due order, *ib.*

SUCCESSION TO THE PECULIAR PROPERTY OF A MAIDEN.—In regard to the property of a maiden—first, the uterine brother is the successor; in his default, the mother, and failing her, the father. *Narada* says, "The wealth of a deceased damsel, let the uterine brethren themselves take; on failure of them, it shall belong to the mother, or if she be dead, to the father, *Daya Krama Sangraha* ch. ii. s. ii. § 1, *excepting the gifts bestowed by a bridegroom, which, he is entitled to receive back. Paithinasi* says: "The bridegroom

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shall take the gratuity given by himself;" and *Narada* says, "Let the first bridegroom on his return take back the presents he gave to the damsel, who has since been married, and, in the case of her death likewise, let him receive back what he gave after defraying the expenses which they have mutually incurred," *ib.* § 2.

ORDER OF DESCENT.—If the property were given to the woman at the time of her nuptials, her daughters inherit; the maiden, as in the ordinary rule of inheritance, ranking first, then the one betrothed, for she is superior to the married daughter because she belongs to the same original family, (gotra) with her parents, afterwards the married daughter who has, or is likely to have, male issue.* Failing the maiden and such married daughters, the barren and widowed daughters succeed. On failure of daughters the son succeeds, then the daughter's son, (who, however, *Jim. Vahana* postpones to the son of the contemporary wife, but this opinion is refuted by *Srikrishna* and other commentators,) the son's son, the great-grandson in the male line, the son of a contemporary wife, her grandson, and her great-grandson in the male line. In default of all these descendants, if the marriage has been celebrated in any of the approved forms, the husband succeeds, then the brother, the mother, the father. But if celebrated after any of the disapproved forms, the brother is preferred to the husband, and both are postponed to the mother and father, 1 *Macn. Prins. H. L.* 39.

In default of these the succession devolves according to the following table, as given by 1 *Macn. Prins. H. L.* 39 :—

Husband's younger brother.
His younger brother's son.
His elder brothers's son.
Sister's son.
Husband's sister's son.
Brother's sons.
Son-in-law.
Father-in-law.
Elder brother-in-law.
Sapindas.
Saculyas.
Samanodicas.

WHEN GIVEN TO HER BY HER FATHER.—If the property be given to her by her father, but not at the time of her nuptials, the heirs are thus successively enumerated, viz. :—

A maiden daughter.
A son.
A daughter who has, or is likely to have, male issue.

* At the death of a maiden or betrothed daughter, on whom the inheritance had devolved, and who proved barren, or on the death of a widow who had not given birth to a son, the succession of the property which they had so inherited will devolve next on the sisters having, and likely to have, male issue, and in their default, on the barren and widowed daughters, 1 *Macn. Prins. H. L.* 39, note.

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Daughter's son.
Son's son.
Son's grandson.
The great-grandson in the male line.
The son of a contemporary wife.
Her grandson.
Her great-grandson in the male line.

In default of these, the barren and the widowed daughters succeed as co-heirs, and then the succession goes on as in the approved forms of marriage, 1 *Macn. Prins. H. L.* 40.

IF NOT GIVEN HER BY HER FATHER.—If the property has not been given her by her father, and not given to her at the time of her nuptials, the heirs are in the same order as above, with the exception that the son and unmarried daughter inherit together, and not successively, and that the son's son is preferred to the daughter's son, *ib.* 40.

SUCCESSION OF A WOMAN'S CHILDREN TO HER SEPARATE PROPERTY.—Partition of woman's property is explained. *Menu* says, "When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate, ch. ix. § 192. The meaning must be this, Let sisters and brothers of the whole blood share the estate, *Jim. Vahana*, ch. iv. s. ii. § 2. *Vrihaspati* says a woman's property goes to her children, and the daughter is a sharer with them, provided she be unaffianced; but, if married, she shall not receive the maternal wealth. Here, the term children intends sons, and they share the mother's goods with unbetrothed daughters. So *Sankha* and *Likhita* say, "All uterine brothers are entitled to share the wealth equally, and so are unmarried sisters," *Jim. Vahana*, ch. iv. s. ii. § 4. The son inherits, whether initiated or uninitiated. The text of *Devala* is conclusive against the supposition that unmarried daughters and sons inherit successively. He says, "A woman's property is common to her sons and unmarried daughters when she is dead, but if she leave no issue her husband shall take it, her mother, her brother, or her father," *ib.* § 6.

On failure of either the son or unmarried daughter, the other is heir. On failure of both of them, a married daughter who has a son, and her who may have male issue, for by means of the sons they may present oblations at solemn obsequies, *Jim. Vahana*, ch. iv. s. ii. § 9; and for the same reason daughters' sons inherit on failure of daughters, for *Menu* declares, "Even the son of a daughter delivers him in the next world like the son of a son," ch. ix. § 139; *Jim. Vahana*, ch. ii. s. iv. § 10. Neither a barren nor a widowed daughter succeeds, for these present no oblations at solemn obsequies, either in person, or by means of their offspring, *Jim. Vahana*, ch. iv. s. ii. § 10. Accordingly, since the daughter's right of succession is founded on benefits conferred by means of her male issue, *Srikrishna*; or since neither the barren nor the widowed daughter's

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right of equal succession is recognised, *Achyuta; Narada* says, On failure of the son the daughter inherits, for she equally continues the lineage. But if there be a son's son and a daughter's son claiming the inheritance, the son's son has the exclusive title, for it is reasonable, since the married daughter is debarred from the inheritance by the son, that the son of the debarred daughter should be excluded by the son of the person who bars her claim, *Jim. Vahana*, ch. iv. s. ii. § 11.

On failure of all these, including the daughters' son [and the son's grandson, *Srikrishna,*] the barren and the widowed daughters both succeed to their mother's property, for they also are her offspring, and the right of others is declared to be on failure of issue, *ib.* § 12.

Passages apparently contradictory of the daughter's succession in exclusion of the son relate to the wealth received by the mother at her nuptials.—The text of *Gautama,* A woman's separate property goes to her daughters unaffianced, and to those not actually married; that of *Narada,* Let daughters divide their mother's wealth, or on failure of daughters, her male issue; a passage of *Katyayana,* But on failure of daughters the inheritance belongs to the son; as also one of *Yajnavalchya,* Daughters share the residue of their mother's property after payment of her debts; and the male issue succeeds in default, relate only to the (*Yautuka*) wealth given at nuptials; for these passages contradict the text of *Devala* above cited. Accordingly, since it is in the case of wealth given at nuptials that the unmarried daughter has the prior right of succession, or has the exclusive right, *Menu* says, "Property given to another on her marriage, *Yautuka,* is the share of her unmarried daughter," *Jim. Vahana,* ch. iv. s. ii. § 13.

Yautuka signifies property given at a marriage, from the verb yu, to mix; *ib.* § 14. *Vasishtha* says, "Let the females share the nuptial presents, (parinayya) of their mother; for parinayya signifies wealth received at a marriage; *ib.* § 15.

As for a passage of *Menu,* "The wealth of a woman which has been in any manner given her by her father, let the Brahmini damsel take, or let it belong to her offspring. *Menu,* ch. ix. § 198. The meaning must be, that property which was given to her by her father even at any other time besides that of the nuptials, shall belong exclusively to her daughter, and the term Brahmini is merely illustrative, (indicating that a daughter of the same tribe with the giver inherits, *Mahesvara,*) or lest the term should be impertinent, the text may signify that the Brahmini damsel being daughter of a contemporary, shall take the property of the *Kshetriya* and of other wives dying childless, which had been given to them by their fathers. The precept which directs that "the property of a childless woman shall go to her surviving husband," does not here take effect. Such is the meaning of the passage; for else, (according to the preceding interpretation, *Srikrishna,*) all the texts (which

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declare the equal right of the son and daughter to inherit their mother's property in certain cases) would be incongruous, *Jim. Vahana*, ch. iv. s. ii. § 16. See *post*, p. 212.

The daughter's son is not meant where it is said, that issue male succeeds on failure of daughters, *ib.* § 17.

Such an interpretation cannot be supported by the metaphorical sense of terms, *ib.* § 18, nor by construction, *ib.* § 19.

Besides the word "daughter" in the text of *Yajnavalchya* having the termination of the first or nominative case, and the pronoun (their) having that of the fifth ablative, cannot be connected with the term issue by construction, which requires the sixth or relative case. But this term governs the word "mother," notwithstanding the intervention of mediate terms; thus, then, with the certainty that issue of the mother is here intended, it is reasonable to interpret issue of the mother (as signifying son, *Mahesvara*) in the text of *Narada* and *Katyayana*, for there can be no contradiction, since the passage must be presumed to be grounded on the same revelation, *Srikrishna and Chudamani; Jim. Vahana*, ch. iv. s. ii. § 20.

IT IS RIGHT THAT THE SON SHOULD INHERIT BEFORE THE DAUGHTER'S SON.—Moreover, conformably with the text of *Baudhayana*, male issue of the body being left, the property must go to them, and because (the son, as immediate issue of the mother, is) nearer of kin (than the daughter's son, who is a mediate descendant,) it is reasonable, that the son born of her body should have the right of succession to his mother's property, and not the daughter's son, who is a mediate descendant not born of her person, *ib.* § 21.

Hence a woman's separate property received by her at her nuptials goes to her daughter and not to her sons, (if there be a daughter, *Srikrishna and Mahesvara*,) and the text of *Gautama*, § 13, is intended to explain the order of succession in this case, (of an inheritance devolving on the female issue,) *Jim. Vahana*, ch. iv. s. ii. § 22.

FIRST, THE WOMAN'S PROPERTY GOES TO HER UNAFFIANCED DAUGHTERS.—If there be none such, it devolves on those who are betrothed. In their default, it passes to the married daughters. For the right of the female issue generally is suggested by the term daughters, (in *Gautama's* text, § 13,) and the special mention of "unaffianced" and "unmarried" which follows is pertinent as declaratory of the order of succession, (and not as a limitation of the preceding term,) *Jim. Vahana*, ch. iv. s. ii. § 23. *Yajnavalchya*, 2, 146, says, "The separate property of a childless woman married in the form denominated Brahma, or in any of the four (unblamed forms of marriage,) goes to her husband; but if she leaves progeny it will belong to her daughter; and in other forms of marriage, (as the Assoora, &c.,) it goes to the father, (and mother, on failure of issue,) *Jim. Vahana*, ch. iv. s. ii. § 24, 27. Here in certain forms of mar-

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riage termed Brahma, &c., what has been received by a woman at the nuptial fire goes after her death first to her daughters, (not like property received at any other time but that of her nuptials, to her sons as well as her daughters, *Srikrishna.*) Again, the right devolves first on the maiden daughter, conformably with the text above cited, *Achyuta* and *Srikrishna;* if there be none, it descends to the betrothed daughters, or for want of such it goes to a married daughter (including even a barren or a widowed one, *Chudamani,*) or on failure of all daughters it devolves on the son. For the husband's right of succession is relative to property of a wife who leaves no issue whatever, *Jim. Vahana*, ch. iv. s. ii. § 25.

The right of the married daughter too, on failure of the unaffianced one and the rest, has been hinted by *Vrihaspati* using the term unaffianced, *ib.* 26.

It should not be alleged that the text of *Yajnavalchya*, cited § 24, does not relate exclusivly to wealth received at nuptials, but is applicable to any property, whether obtained then or at any other time, and appertaining to a woman espoused by such forms of marriage; for the preceding passage, *Yajnavalchya*, 2, 145, (which is declaratory of a brother's right of succession,) would have no pertinency, (since even in that case the husband or the father would inherit under the text in question,) and it would disagree with *Menu*, for he says, "It is admitted that the property of a woman, married by the ceremonies called Brahma, &c., shall go to her husband if she die without issue. But her wealth, given to her on her marriage in the form called Assoora, or either of the other two, Rakshara and Paisacha, is ordained, on her death without issue, to become the property of her mother and of her father, *Menu*, ch. ix. 196, 197. Here the subsequent terms, "wealth given to her," are ununderstood in the preceding sentence. Therefore, by thus connecting the terms, "wealth given to her at the nuptial ceremonies," &c., the text appears to relate to property received at her marriage, and not generally to any property whatever, *Jim. Vahana*, ch. iv. s. ii. § 27. So *Yama* saying, "wealth which is given at marriages called *Assoora*," &c., (is acknowledged to belong to the parents, if the woman die without issue,) appears to intend nuptial presents exclusively; that is, wealth which is given while the marriage ceremony lasts, having been commenced but not being finished, *ib.* § 28.

The texts do not relate to any property belonging to a woman married in such a form, but to property given to her at a marriage celebrated in such form, *ib.* § 29.

Succession to the separate property of a childless widow.—The separate property of a childless woman married in the form denominated Brahma, or in any of the four (unblamed) forms of marriage, goes to her husband, *Jim. Vahana*, ch. iv. sec. iii. § 2, 4, 5.

These forms are the Daiva, Arsha, Prajupatya, and Gandharva. Wealth which has been received by a woman while the marriage in

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any of these forms is celebrated devolves on her husband if she die without issue, *Jim. Vahana*, ch. iv. s. iii. § 3.

A woman's property received at a marriage in a form called Assoora, and the like, her mother may take on her demise, though her husband be living; and on failure of the mother, the father, *ib.* § 6.

The wealth of a deceased damsel let the uterine brethren themselves take; on failure of them it shall belong to the mother; or, if she be dead, to the father, *Jim. Vahana*, ch. iv. s. iii. § 7.

The brother does not inherit preferably the nuptial present as he does a maiden's property, *ib.* § 9.

But wealth received by a woman after her marriage, from the family of her father, of her mother, or of her husband, goes to her brothers—not to her husband. *Yainavalchya* declares, "That which has been given to her by her kindred, as well as her fee or gratuity, and anything bestowed after marriage, her kinsmen take if she die without issue," *Jim. Vahana*, ch. iv. s. iii. § 10.

Given by her kindred, "presented to her by her father or mother (during her maidenhood, *Chudamani* and *Srikrishna*.") Hence since the words, given by her kindred, intend given by the father and mother, their sons, who are her brothers, are the kinsmen here signified, *ib.* § 11.

Katyayana says, "Immoveable property which has been given by parents to their daughter goes always to her brother if she die without issue. For it appears that the brother's right of succession is founded simply on her leaving no issue, which is the case equally of a maiden as of a childless wife, *Jim. Vahana*, ch. iv. s. iii. § 12, 13.

Under the term immoveables in the above passage of *Yajnavalchya* is included the moveables, *Jim. Vahana*, ch. iv. s. iii. § 14.

Presents given to her when a maiden are included in paragraph 10.—By the phrase, given her by her kindred, is signified that which was given her by her parents when a maiden. For anything given her subsequently to her nuptials is comprehended under gift subsequent, and either the husband or the parents inherit that which was given her at the time of the wedding. *Katyayana* describes a gift subsequent, "What has been received by a woman from the family of her husband, and at a time posterior to her marriage, is called gift subsequent;" and so in that which is similarly received from the family of her kindred, *Jim. Vahana*, ch. iv. s. iii. § 16.

From the family of her husband—that is, from her father-in-law and the rest—from her kindred, from that of her father or mother, *ib.* § 17; so whatever is received after her nuptials either from her husband or from her parents through the affection of the giver, *Bhrigu* pronounces gift subsequent, § 18.

Explanation of fee, or perquisite, by the same author.—Whatever has been received as a price of workmen on houses, furniture, and carriages, milking vessels and ornaments, is denominated a fee, *ib.* § 19; and this is explained to mean "What is given

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to a woman by artists constructing a house, or executing other work, as a bribe to send her husband, or either parents (of her family) to labour on such particular work, is her fee. It is the price of labour, since its purpose is to engage a labourer," *ib.* 20. *Vyasa* says, "What is given by way of a bribe, or the like, to induce her to go to the house of her husband (*ib.* 21), whatever be the form of marriage, such fees, or any similar property of a childless woman, her brothers inherit," *ib.* § 22.

The term culca (perquisite) is not employed in its sense of price, as intending a gratuity for the price of the bride, such as is given at an Assoora marriage, *ib.* § 23, 24.

The brother is heir to the fee, or perquisite under every form of marriage, *ib.* 25.

Gautama conveys the same meaning as *Katyayana.* "The sister's fee belongs to the uterine brothers; after them it goes to the mother, and next to the father. In the first place, it goes to her brother of the whole blood; in failure of him, to the mother; on her default it devolves on the father, *ib.* 27, 28. Therefore the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father; on failure of these, to the father, *ib.* 29.

On failure of the above-mentioned heirs, collaterals inherit.—*Vrihaspati* says, The mother's sister, the maternal uncle, the father's sister, the mother-in-law, and the wife of an elder brother are pronounced similar to mothers. If they leave no issue of their bodies, nor son (of a rival wife), nor daughter's son, nor son of those persons, the sister's son and the rest shall take their property, *ib.* 31, 32.

Daughter's son succeeds on failure of the daughter, and of male issue.—If there be no legitimate son or daughter, nor a grandson in the male line, nor a son of a rival wife, the right of succession devolves on the daughter's son, *ib.* 33; but not on the son of a daughter's son, for he is excluded from the oblation of food at obsequies, *ib.* 34.

For want, then, of sons and other lineal heirs as here specified, and in default of brothers or other preferable claimants, including the husband, the inheritance passes to the sister's son and the rest, although kinsmen, as the father-in-law, the husband's elder brother, or the like be living. For the chief purpose of indicating, under the head of inheritance, the competency to present funeral oblations, as is done by describing the women as similar to mothers and certain persons as standing in the relation to them of sons, is to suggest the right of succession to their property, *Jim. Vahana*, ch. iv. s. iii. § 35. But not the *order* of succession.

Order of succession to the separate property of childless women.—Since the text enumerates "sister's son," &c., if the order of succession consequently be first the sister's son, then the husband's sister's son, next the child of the husband's younger brother, afterwards the child of the husband's elder brother, then the son of the

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brother, after him the son-in-law, and subsequently the younger brother-in-law, the right would devolve last of all on the younger brother of the husband contrary to the opinion and the practice of venerable persons. Therefore the text is propounded not as declaratory of the order of inheritance, but as expressive of the strength of the fact—(namely, of the benefits conferred.) Thus *Menu* declares under the head of inheritance, "To three ancestors must water be given at their obsequies, for three is the funeral oblation of food ordained, the fourth is the giver of oblations, but the fifth has no concern with them," ch. ix. § 186. In like manner *Yajnavalchya* shows succession to property in right of the funeral oblation, "Amongst these (sons of various descriptions) the next in order is heir and giver of oblations on failure of the preceding. The son's preferable right seems to rest on his presenting the greatest number of beneficial oblations, and on his rescuing his parent from hell; and a passage of *Vrddha Catatapa* expressly provides for the funeral oblations of these women, "For the wife of a maternal uncle, or of a sister's sons, of a father-in-law, and of a spiritual parent, of a friend, and of a maternal grandfather, as well as for the sister of the mother or of the father, the oblation of food at obsequies must be performed, *Jim. Vahana*, ch. iv. s. iii. § 36.

This, then, is the order of succession to a woman's property according to the various degree of benefit to the owner of the property from the oblations of food at obsequies. In the first place—

The husband's younger brother, for he is a kinsman, (sapinda,) and presents oblations to her, to her husband, and to three persons to whom oblations were to be offered by her husband; after him the

Son of his husband's eldest brother, or

Son of his younger brother, is heir to the separate property of his uncle's wife; for he is a kinsman, and presents oblations to her, to her husband, and to two persons to whom oblations were to be offered by her husband. On failure of such, the

Sister's son, though he be not a kinsman, (sapinda,) inherits the separate property left by his mother's sister, because he presents oblations to her, and to three persons (her father and the rest) to whom oblations would have been offered by her son. In default of him

Son of the husband's sister (for it is reasonable, since the husband has a weaker claim than the son, that persons claiming under them should have similar relative precedence) is heir to the property of his uncle's wife, because he presents oblations to three persons to whom they were to be offered by her husband, and also presents oblations to her and to her husband. On failure of him, the

Brother's son is the successor of his aunt's property, for he presents oblations to the father, to her grandfather, and to herself. If there be no nephew, the

Son-in-law or husband of her daughter is heir to his mother-in-law's property, since he presents oblations to his mother-in-law and father-in-law.

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The text indicates heirs, not their order of succession. This order of succession must be assumed, and the mention of a sister's son and the rest, § 31, was intended merely for an indication of the heirs without specifying the order in which they succeed, *ib.* § 38.

Again, on failure of these six, it must be understood that the succession devolves on the

Father-in-law.

Eldest brother-in-law and the rest, according to their nearness of kin, (the nearest sapinda being the heir,) *ib.* § 39.

It must not be supposed that this text, § 31, is applicable where a failure of kinsmen (sapinda) exists; for in this chain of successors the husband's younger brother, and his son, and the son of the husband's elder brother have been specified, and the husband's father and elder brother, who are nearer of kin, have been omitted, *ib.* § 40.

A CONTRARY PRACTICE MUST BE REJECTED AS UNAUTHORISED.—Therefore the practice of preferring the father-in-law to the younger brother-in-law, or of regulating the succession in the order specified in the passage above cited, § 31, which has been introduced for want of comprehending the text of *Vrihaspati*, § 31, or those of *Menu* or *Yajnavalchya*, and of understanding the true sense of the law, must be rejected as destitute of reason and authority, *ib.* § 41.

The settled order of succession to the separate property of a woman is thus stated in a summary in the notes to *Jim. Vahana*, at the end of ch. iv., viz. :—

In the case of property left by a maiden the right devolves first on a brother of the whole blood; if there are none, on the mother; if she be dead, on the father.

It is the same in respect of property left by a betrothed damsel, excepting what was given by the bridegroom, for he has a right to whatever he gave.

In regard to the property of a married woman which was received at her marriage, the first in rank is the

Daughter unmarried.

Daughter betrothed.

Daughters married, who have, or are likely to have, male issue, inherit together; or on failure of either, then the other takes the succession. If there be none of either description

Daughters, barren and widowed, have an equal right, and on failure of one, the other succeeds. Next the right devolves in order on the

Son.

Daughter's son.

Son's son.

Great grandson in the male line.

Son of a contemporary wife.

Her grandson.

Her great grandson in the male line, with this difference, that, according to the author of the work, (*Jim. Vahana*,) the right of the daughter's son follows that of the contemporary wife's son.

In the next place, if the property were received at the time of nuptials celebrated in one of the five forms denominated Brahma, &c., the order of succession is

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Husband.
Brother.
Mother.
Father, but if it were received at nuptials in one of the three forms called Assoora, &c., the order is

Mother.
Father.
Brother.
Husband, then
Husband's younger brother.
Son of his elder brother.
Sister's son.
Husband's sister's son.
Brother's son.
Son-in-law.
Father-in-law.
Elder brother-in-law.
Sapinda's kinsmen allied by funeral oblations in the order of proximity.

Sakulyas, kinsmen connected by family.
Samanodakas, such as are allied by similar oblations of water.
In the case of property given by the father at any other time but the wedding, a
Daughter (maiden).
Son.
Daughter who has, or is likely to have, male issue.
Daughter's son.
Son's son.
Son of a contemporary wife.
Her grandson, and
Great grandson in the male line.
Daughters, barren and widowed, inherit together; afterwards the succession proceeds as before described in the case of property received at nuptials denominated Brahma, &c.

In the case of property not received at a wedding, and other than such as is given by a father, the

Son and daughter, unmarried, inherit together; on failure of both of them,

Daughters who have, or may have, male issue.
Son's son.
Daughter's son.
Great grandson in the male line.
Son of the contemporary wife.
Her grandson, and
Great grandson, in the male line.
Daughters, barren and widowed, inherit together; and lastly, as

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before, the same with that of property received at Brahma nuptials, *Srikrishna; Jim. Vahana*, ch. iv. § 41, summary in note.

ORDER OF SUCCESSION TO WOMAN'S PECULIAR PROPERTY.—According to *Elberling*, in distributing the property in possession of a woman at her death, regard must be had to the manner in which she obtained possession thereof. Thus—

PROPERTY INHERITED AS WIDOW, DAUGHTER, MOTHER, AND GRANDMOTHER.—Property inherited from a husband, father, son, or grandson, goes at her death to the next heir of her husband, father, son, or grandson in existence at her death. The same is the case with any increase or accumulation from such property during her possession, as she is only entitled to the use of such property, *Elberling*, p. 83.

PROPERTY TAKEN BY A CHILDLESS WIFE ON A PARTITION BY HUSBAND OR BY MOTHER ON PARTITION AMONG SONS.—Property taken by a childless wife on a partition by the father in his lifetime among his sons, or by a mother on a division among her sons of the patrimonial estate after their brother's death, goes as far as it may be in existence or undisposed of at her death, to those, or to the legal heirs of those, from whose inheritance it was taken, because the property was given for her maintenance, and is not enumerated among the different acquisitions of a woman termed *stridhun*, *Elberling*, p. 83.

BOMBAY SCHOOL—THE SUCCESSORS TO A MARRIED WOMAN'S PROPERTY ARE HER CHILDREN.—The right of succession after a woman's decease, that (part of her) private property, which is entitled a gift subsequent is thus settled by *Menu*, "What she received, after marriage, from the family of her husband, and what her lord may have given her through affection, shall be inherited, even if she die in his lifetime, by her children. The term children is thus explained by *Menu*, ch. ix. § 192; "On the death of the mother let all the uterine brothers and uterine sisters equally divide the maternal estate," *Mayukha*, ch. iv. s. 10, § 13.

ARGUMENT AGAINST THE RECIPROCAL RIGHTS OF THE SONS AND THE DAUGHTERS.—When from non-existence of daughters and the rest, the right of inheritance devolves even to the sons from their connexion, then it becomes reciprocal. When this right is taken up by unmarried daughters, then the son's succession arising from that connexion is at an end; but according to the *Mitacshara*, it is not declared that the succession pertains (equally or) reciprocally to the brothers and unmarried sisters. Yet it has been said by others, "It is declared that there is no original connexion of sons and daughters in property received by their mother after marriage, or given by her husband through affection," *Mayukha*, ch. iv. s. 10, § 14.

AMONGST DAUGHTERS THE UNMARRIED ARE FIRST, SHARING WITH SONS.—The distinctions in succession among daughters are pointed out by *Menu*:*—"A woman's property goes to her children, and

* It is not a text of *Menu*, but of *Brihaspati*, note 6; *Mayukha*, ch. iv. s. 10, § 15.

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the daughter is a sharer with them, provided she be not given away; but if married, she receives a mere token of respect." *Is a sharer;* shares equally with the sons. *Not given away;* unmarried. It means that, if there be one (unmarried,) then the married (daughter) receives a mere token of respect—that is, only something very small. If there be no unmarried daughter, the share of the married daughter is equal to that of the brothers, according to the text of *Katyayana.* "Married sisters shall share with (brothers or) kinsmen, *Mayukha*, ch. iv. s. 10, § 15.

The daughters' daughters get some trifle, *ib.* § 16.

All property acquired by marriage the daughter, and not the son, takes.—But all property acquired by marriage, *Yautaka*, goes to the unmarried daughter alone, not to the son. So a prior text of *Menu*, ch. ix. § 131: "Property given to the mother on her marriage, *Yautaka*, is inherited by her (unmarried) daughter." *Property given on her marriage*—whatever is received by her at the time of marriage, or other (ceremony), whilst seated together with her husband; for, according to *Madana*, "The word *Yautaka* is, in the *Nighantu*, derived from their being then joined together, *Yuta.*

All the property, except two kinds, goes to daughters unmarried or unprovided.—In respect to woman's property before enumerated in the texts of other sages, distinct from that acquired subsequent to marriage, or through their husbands' affection, these distinctions are declared by *Gautama:* "A woman's property goes to her daughters unmarried or unprovided." *Unprovided;* such as are destitute of wealth, *Mayukha*, ch. iv. s. x. § 18.

A distinction when wives of different classes exist.—The daughter of a Brahmini wife, however, shall take the wealth of her step-mother. Thus *Menu*, ch. ix. § 198: "The wealth of a woman which has been in any manner given to her by her father, let the Brahmini damsel take, or let it belong to her offspring." By giving the particle *or* the sense of *and*, we have it, 'and shall be shared by (her issue.') Some say that the word Brahmini is used to denote any girl of equal or superior caste; but the proof of this must be well examined. See *ante*, p. 303.

In default of daughters, their issue succeed.—If there be no daughters, then the issue of those daughters succeed, according to the text of *Narada.* "Let daughters divide their mother's wealth, or, on failure of daughters, their male issue, *Mayukha*, ch. iv. s. x. § 20.

Distribution among daughters and among their sons, is according to mothers.—A distribution among daughters by different mothers, as well as amongst the different daughters' sons, to be just, must be apportioned after the example of that prescribed for the sons of different fathers, where the partition is according to their father's shares, (not to the number of the sons of each father,) *Mayukha, ib.* § 21.

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Issue of the daughters succeed on their default.—*Yajnavalchya* says, "The daughters share the residue of the mother's property after payment of her debts, and the issue succeeds in their default." Some say the word issue (*Anvaya*) has reference to the offspring of the daughters; whilst others hold, that if she leave no daughter, even her sons may take it, since the word *tad*, in the text of *Narada* above, distinctly points out the mother alone, and this (first) doctrine agrees with custom, *ib.* § 22. *The residue after payment of her debts*—on this subject, those acquainted with the ancient law have declared that the sons alone must take the property (if only) equal, to or less than the amount of debt, *Mayukha*, ch. iv. s. x. § 22.

On failure of daughters and their issue.—If daughters or the rest do not exist, the sons, grandsons, and the rest must take it; for thus it is declared by *Katyayana*. But on failure of daughters the inheritance belongs to the sons, *ib.* § 23.

The right of daughters and their issue confined to the six kinds of property.—This right of inheritance of daughters and the rest in the mother's property exists only in wealth given before the nuptial fire, and in the bridal procession, and the other (kinds) above recorded in the texts, (pars. 1, 2, 3,) *ante*, p. 187, specifying woman's property; for if relating to all wealth in which their mother has any property, it would go to set aside these texts (limiting it to six), *ib.* § 24.

Woman's property is an exception to the general right of sons.—*Yajnavalchya*: "Let sons divide equally both the effects and the debts after (the demise of) their two parents," relates to (what is) acquired by the act of partition and the like, with the exception of that declared in the above texts (pars. 15, 18) as woman's property. From this it is clear that if there be daughters, the sons, or other heirs even, succeed to the mother's estate, distinct from that part before described (as woman's property), *ib.* § 26.

On default of offspring, the kinsmen succeed.—Her kinsmen take it if she die without issue, *Yajnavalchya*, *Mayukha*, ch. iv. s. x. § 27.

The right of kindred depends upon the particular form by which the woman was married.—The same author expounds the succession of kindred to be according to the different kinds of marriage. "The property of a childless woman, married in the form denominated Brahma, or in any of the other four (unblamed modes of marriage,) goes to her husband; but if she leave progeny, it will go to her daughters; and in the other forms of marriage, as the Assoora, &c., it goes to her father and mother, on failure of her own issue." In the one case, if there be no husband, then the nearest to her in his own family takes it; and in the other case if her father do not exist, the nearest to her in her father's family succeeds, (for the law that,) "To nearest sapinda the inheritance next belongs," as declared by *Menu* denotes, that the right

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of inheriting her wealth is even derived from the nearness of kin to th deceased (female) under discussion—and though the *Mitacshara* holds that on failure of the husband it goes to his nearest kinsman (sapinda) allied by funeral oblations, and on failure of the father then to his nearest sapinda; yet from the context it may be demonstrated that her nearest relations are his nearest relations, and (the pronoun *tat* being used in the common gender) it allows of our expounding the passage "those nearest to him through her, in his own family," for the expressions are of similar import, *ib.* § 28.

THE EFFECT OF THESE RIGHTS IS DIFFERENT IN THE DIFFERENT CLASSES.—In the Brahma, or in any of the other four, relates to the Brahmanical class, on account of those rights being the only ones lawful in respect to them. But as the Gandharva right is also lawful to the Kshetriya class and the rest, so also the wealth of her who has been married according to that form, devolves to her husband alone, and so *Menu*, ch. ix. § 106, 107, it is ordained that the property of a woman married by the ceremonies called Brahma, &c., shall go to her husband if she die without issue. But her wealth given on the marriage called Assoora, &c., is ordained on her death without issue to become the property of her mother and father, *Mayukha*, ch. ix. s. x. § 29.

HEIRS OF A WOMAN ON FAILURE OF HER HUSBAND AND PARENTS DEFINED.—On failure of the husband of a deceased woman, if married according to the Brahma or other four forms, or of her parents, if married according to the Assoora, or other two forms, the heirs to the woman's property, as expounded above, are thus pointed out by *Vrihaspati*,*

The mother's sister.
The maternal uncle's wife.
The paternal uncle's wife.
The father's sister.
The mother-in-law.
The wife of the elder brother are pronounced similar to mothers.
If they leave no son born in lawful wedlock, nor daughter's son, nor his son, then

The sister's son and the rest shall take their property. Here must be understood, "On failure both of the daughter and also of her daughter," because only on failure of them does the right of inheritance pertain to the son born in wedlock, or to the daughter's son, *ib.* § 30.

THE SON IN THAT CASE INHERITS PRESENTS FROM KINDRED.—In respect of property given by the kindred (Bundhu) at an Assoora marriage, or the like, *Katyayana* says, "That which has been given to her by her kindred, goes, on failure of kindred, to her son,† *ib.* § 31.

* In the translation of *Jim. Vahana*, the maternal uncle is put for his wife, and the paternal uncle's wife is not noticed. The present version will be found in the *Digest* 3, 618, except that his son is there explained the son's son.

† *Jim. Vahana*, 3 *Dig.* 593, 615, it is husband instead of son.

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AND THE BROTHER GETS THE PERQUISITE.—But on the subject of the perquisite *Gautama* holds, "The sister's perquisite belongs to the uterine brothers after the death of the mother, *ib*, § 32.

GIFTS TO BE RESTORED TO THE BRIDEGROOM WHEN THE BRIDE DIES BEFORE MARRIAGE, DEDUCTING CHARGES.—But what *Sankha* says, "The lover may take back his nuptial present on the death of his betrothed mistress," must be understood of one dying previous to the celebration of the marriage. Here it is further remarked by *Yajnavalchya*, "If she die after troth plighted, let the bridegroom take back the gifts which he had presented, paying, however, the charges on both sides." The meaning is, that the husband may take back, if his bride is dead, what remains of the perquisite previously given, after calculating the expenses incurred by himself and by her father, *ib.* s. 33.

PRESENTS BY THE MATERNAL KINDRED BELONG TO THE BROTHERS OF THE DECEASED DAMSEL.—*Baudhayana* records a distinction on some points, "The wealth of a deceased damsel, let the uterine brothers themselves take. On failure of them, it shall belong to the mother, or if she be dead, to the father. Those skilled in the ancient law have declared that this relates to ornaments or the like presented by the maternal grandfather and the rest; at the time of betrothal to a girl, who afterwards dies before completion of the marriage, *ib.* § 32.

MITHILA SCHOOL.—SUCCESSION TO A WOMAN'S SEPARATE PROPERTY.—HOW A WOMAN'S PROPERTY IS TO BE DIVIDED.—*Menu* says on this subject, "On the death of a mother, let all the uterine brothers and (if unmarried) the uterine sisters divide the maternal estate in equal shares. It is fit that to the daughters of these daughters something should be given from the estate of their maternal grandmother, on the ground of natural affection."

Explanation.—*Uterine* signifies the offspring of the same father and mother. *Sisters.*—Only the unmarried ones are to be equal sharers. *Vrihaspati* confirms this by declaring that "a woman's property goes to her children, and the daughter is sharer with them, provided she be unaffianced; but if she be married, she shall not receive the maternal wealth." Something should be given her, that her feelings may not be wounded. "*To her children,*" means to her sons. "*Share with them,*" that is an equal partaker, because no distinction is made. "*If she be married,*" signifies if *provided* with a husband. "*Something,*" that is in proportion to the estate, *Chintamani*, p. 267.

WHO RECEIVE A WOMAN'S SEPARATE PROPERTY.—*Gautama* says that a woman's property goes to her daughters, unmarried and unprovided for.

Explanation.—*Unprovided* indicates misfortune, such as the want of a son, husband, or wealth. This opinion is held in the *Ratnakara*, and by some other writers.

THE DAUGHTER SHALL RECEIVE A SHARE FROM THE MATERNAL

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ESTATE.—Even if the daughter, as above described, be destitute of a son, she shall receive a share from the maternal estate like the sons.

THE UNMARRIED DAUGHTER INHERITS THE PROPERTY GIVEN TO THE MOTHER ON HER MARRIAGE.—*Menu* says, "Property given to the mother on her marriage (*Yautaka*) is the portion of her unmarried daughter."

Yautaka means the property received at the time of marriage from parents, and such like. *Nuptial gifts.*—*Vasishtha* says, "Let the females share the nuptial gifts (*parinayya*) of their mother." "A nuptial gift (*parinayya*) means furniture, such as a mirror, combs, and so forth," *Chintamani*, p. 268.

WHO RECEIVES THE RESIDUE OF THE MOTHER'S PROPERTY AFTER PAYMENT OF THE DEBTS?—"Let the daughters divide the mother's effects remaining over and above the debts. On failure of such the (male) issue, that is, the sons, (in other words) their brothers and their (daughters') sons, shall inherit, according to *Menu*, *ib.*

WHERE THE RULE IS APPLICABLE.—The foregoing rule refers to the property received by the woman at the time of her marriage in the form denominated Brahma, and her (nuptial gifts; that is,) furniture, combs, and so forth, *ib.*

WHO SUCCEED ON FAILURE OF DAUGHTERS.—*Katyayana* says, "But on failure of daughters the inheritance belongs to the son. That which has been given to her by her kindred goes, on failure of kindred, to her husband," *ib.*

MARRIED SISTERS SHARE WITH KINSMEN.—Married sisters shall share with kinsmen. This law concerning the separate property of "women is ordained in the case of partition," *ib.*

ON FAILURE OF DAUGHTERS, AND SO FORTH.—The meaning of this is, that the mother's estate, which consists in her furniture, nuptial gifts, as well as the gifts of parents, goes to her son, provided there be no daughters, *ib.*

The property, except the above-mentioned articles, goes to the son and daughter after the death of the owner. This has been ordained before, *Chintamani*, 269.

MARRIED SISTER SHALL RECEIVE SOMETHING FROM THE ESTATE GIVEN TO HER BY HER KINDRED.—What is given by any one, except the father, goes to both the brother and sister; but the latter, if unmarried, becomes an equal sharer. The sisters, if married, shall receive something from the estate. This is the signification of the text regarding married sisters, *ib.*

Explanation.—*On failure of kindred*, that is, in default of daughter's son, and the like, the woman's property devolves on her husband, *Chintamani*, p. 269.

THE PROPERTY OF A WOMAN MARRIED ACCORDING TO CERTAIN CEREMONIES SHALL GO TO HER HUSBAND ON FAILURE OF ISSUE—WHEN HER PROPERTY GOES TO HER PARENTS.—*Menu* says, "It is

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admitted that the property of a woman married according to any of the ceremonies called Brahma, Daiva, Arsha, Gandharva, and Prajapatya shall go to her husband if she die without issue. But her wealth given to her on her marriage in the form called Assoora, or either of the other two (Rakshasa and Paishacha) is ordained, on her death without issue, to become the property of her mother and father," *ib.*

Explanation.—Without issue is without children.

WHO ACCORDING TO GAUTAMA SHALL GET THE SISTER'S FEE—*Gautama* says, "The sister's fee belongs to the uterine brothers; after them it goes to the mother and then to the father." Some say that it goes to him before her, *ib.*

WHERE THIS TEXT APPLIES.—This text alludes to property received at the time of marriage (in the form) called *Assoora*, and the other two, *Chintamani*, p. 270.

WHO SHALL TAKE THE WEALTH OF A DECEASED DAMSEL—*Baudayana* says, "The wealth of a deceased damsel, let the uterine brothers themselves take; on failure of them, it shall belong to the mother; or, if she be dead, to the father."

Appended to the *Vivada Chintamani*, following the preface, is the annexed summary :—

ORDER OF SUCCESSION TO THE PECULIAR PROPERTY OF WOMEN—STRIDHANA, HOW FAR HERITABLE.—Any wealth, moveable or immoveable, which women receive or inherit is their stridhana, that is, peculiar property, which they have the power to give away, sell, or dispose of at their pleasure. But they have no right to dispose of the immoveable property from their husbands or other relations, *Chintamani.*

WHO MAY INHERIT STRIDHANA.—According to the *Mitac.*, and other works, the son of a woman cannot inherit her peculiar property during the lifetime of her *daughter*. But according to the *Vivada Ratnakara*, her daughter and son have an equal right to her whole property, excepting nuptial gifts, (perinaya) Yautaka, &c., received from the father, *ib.*

DAUGHTER'S DAUGHTERS REPRESENT THEIR MOTHERS.—In the case of the succession of daughter's daughters, their shares shall be determined according to the number of mothers; in other words, if a daughter leave one daughter, and a second two, the grandmother's property shall be divided into two parts, according to the number of the mothers. They who are not married have precedence over those who are, *Chintamani.*

THE UNMARRIED EXCLUDE THE MARRIED.—To the property of a woman, if married, according to the forms called Brahma, &c., in default of her sons and grandsons, her husband, and in his default, his sapinda (kinsmen) have right; but if married according to the forms called Assoora, &c., her mother and father, and in their default, her sapinda, (kinsmen,) *ib.*

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Co-wife's children.—According to the *Madana Parijata*, a co-wife's daughter, or daughter's son, is entitled to the wealth of a woman who dies leaving no children, *ib.*

Sister's son, &c.—In the *Vivada Ratnakara* mention is made of the right of the sister's son, husband's sister's son, &c., *ib.*

Heirs of the separate property of the deceased proprietress.—

	Order of Succession.
Unmarried daughter,	1
Barren widowed daughter,	2
Married daughter,	3
Daughter's daughter,	4
Daughter's son,	5
Son,	6
Grandson,	7
Co-wife's son, (or step-mother's,)	*nil.*
Co-wife's daughter,	*nil.*
„ grandson,	*nil.*
„ daughter's son,	*nil.*
„ great-grandson,	*nil.*
Husband,	*
Husband's sapinda,	*
„ sister's son,	*nil.*
Father,	*
Mother,	*
Mother's sapinda,	*
Brother,	*nil.*
Brother's son, &c.,	*nil.*
If she die unmarried her heirs are	
Uterine brother,	1
Mother,	2
Father,	3

—*Chintamani*, *ib.*

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CHAPTER IX.

INHERITANCE OR SUCCESSION.

Section I.—*Introductory Remarks.*

The law of inheritance is complicated—Founded on consent rather than reason—Difficult to reduce rules to general principles—Comparison between English and Hindoo law favourable to latter—Hindoos patriarchal people—Co-proprietors—Line of descent—Meaning of heritage—Wealth not reunited—Right of the natural family to inherit property acquired by adoption—When adopted son dies without issue—Death opens up the inheritance—Presumption of death—Civil death—Loss of caste—Three classes of heirs—Sapindas—Limit of—They extend to the sixth in descent—Samonadacas—Limit of—Bundhus—Order of heirs.

We have now arrived at the subject, Inheritance or Heritage.

The law of inheritance complicated.—In all codes of law in all countries the law of inheritance forms a most important branch of jurisprudence, and at the same time the most complicated and intricate. The real property law of all European states is complex and complicated in the extreme. It will not be matter of surprise then to find that the Hindoo law of inheritance is equally so; nevertheless, compared with other codes it certainly has the advantage in point of simplicity.

Founded on consent rather than reason.—This is accounted for on the principle that that law is founded more upon the consent than on reason.

The rule that a son succeeds to the property of his parent is a natural and almost an universal law, yet nothing would be more difficult than to support this proposition by a process of reasoning. It is therefore founded more upon consent, and has consequently been modified by the customs of different nations. Hence we find one nation basing the rights of inheritance upon those of primogeniture, another dividing the inheritance, some equally, others unequally, amongst the male and female issue; others again amongst the male issue equally, to the exclusion of the females; and in Malabar and Canara we find the females inheriting to the exclusion of the males. Some nations acknowledge succession by right of representation, and the right to inherit in the order of

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proximity. The diversity upon this subject that prevails amongst different nations is still greater when we come to deal with collateral succession, and the arbitrary character of the rules are still more obvious.

DIFFICULT TO REDUCE RULES TO GENERAL PRINCIPLES.—It is impossible to reduce the canons of inheritance which are recognised as the law of any country to any general or leading principle without assuming some maxim not necessarily or naturally connected with such canons.

For those whose duties require them to understand the rules and maxims of the Hindoo law of inheritance, close study and application are necessary, for a knowledge of this subject cannot be attained by a hasty reference to authorities when occasion arises.

COMPARISON BETWEEN ENGLISH AND HINDOO LAW FAVOURABLE TO LATTER.—On a comparison between the English and Hindoo codes, the latter in point of simplicity will be found to possess the advantage. It is true it may be difficult at times to distinguish what the latter commands from what it commends, or to reconcile the conflicting doctrines of the different schools, or the discordant reasonings of commentators, or the varied opinions of pundits, so as to gather from them what the law upon any given branch of the subject really is. *Sir Thomas Strange*, in the first vol. of his *Hindoo Law*, p. 127, encourages the English student in his investigations by the assurance, "that in pursuing them he is relieved from much of the toil inherent in the study of the correspondent branch under his own law, as arising with reference to real property, from the division of inheritances into different kinds, and the distinctions of estates as regarding the quantity of interest taken in them with the doctrine of estates in expectancy, the whole of which together has in progress of centuries given rise to a body of learning, in parts so nice and abstruse, and upon the whole so various and intricate, as to have occasioned often despair in the study of it, a branch of learning in fact to be acquired and retained only by the most severe study and uninterrupted practice."

HINDOOS ARE A PATRIARCHAL PEOPLE.—It must not be forgotten that the Hindoos are a patriarchal people, several families living together as one; connected in blood, and united in interests, with various dependants, all entitled to provision out of the aggregate fund or common stock, but subject always to separation in the Southern schools, as well as to the exclusion of any one or more from participation in the inheritance for causes hereafter explained.

CO PROPRIETORS.—This unity of interests constitutes amongst such families what is termed co-parcenery, but for which we would substitute co-proprietorship, as conveying the more accurate relation of the parties composing an undivided family. See Index, "co-parcenery," "joint-tenancy."

Co-parcenery, with its incident of survivorship, differing in this particular from co-parcenery with us, and resembling rather joint

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tenancy, 1 *Stra. H. L.* 120.* So that on the death of a Hindoo parcener the succession to his rights (with the exception of property separately acquired by him) vests in the other remaining members. His sons, if he have any, representing him as to his undivided rights, while the females of his family continue to depend upon the common fund till a partition take place, which may never happen, 1 *Stra. H. L.* 120, or their marriage.

Line of descent.—It will be seen in the course of this chapter, that the Hindoo law of inheritance comprehends the deceased's family and his near relations—viz., his issue, male and female; his widow, who takes immediately in default of sons—a term which includes grandsons and great-grandsons. On exhaustion of this line of *descent*, the succession *ascends* to his parents, brothers, nephews, and grand-nephews, this line continuing upwards to the grandfather and great-grandfather, the grandmother and great-grandmother, the latter being given precedence by those who have preferred the mother to the father. The succession then runs downwards to their respective issue, including daughter's sons, but not daughters, the whole being preferred to the half blood; then follow the more remote kindred which we shall presently enumerate.

In proportion as the claimant becomes remote, the particulars vary with different schools and authors presently pointed out.

In default of natural kin, the series of heirs in all the classes, except that of Brahmins, closes with the preceptor of the deceased, his pupil, his priest, hired to perform sacrifices, or his fellow student, each in his order, see *post;* and failing all these, the lawful heirs of the *Kshetrya*, *Vysya*, and *Soodra*, who are learned and virtuous Brahmins, resident in the same town, or village with the deceased, *Jim. Vahana*, ch. xi. s. 6, § 27, 3 *Dig.* 537; 1 *Stra. H. L.* 149.

If an estate should vest by succession in a Brahmin—as he, being such, cannot perform obsequies for one of an inferior caste—the duty may be discharged by substitution of a qualified person, equal in class with the deceased. In all cases where the heir is under disabilities, he must take the same course, paying the person employed for his services, 3 *Dig.* 545, 546; 1 *Stra. H. L.* 149. The king, too, where he takes by escheat, must cause obsequies to be performed for the deceased, *Vishnu Purana*, 4; 3 *Dig.* 623. See *post.*

The Hindoos give the agnate succession the preference, the succession of females being deemed exceptions. But see Malabar and Caranese law, *post.*

Females cannot on account of their sex perform obsequies. They do not, therefore, confer any benefit, and are generally disqualified from inheriting. From this rule there are only four

* It really resembles tenancy in common more than joint tenancy, there being unity of interest, which may be unequal; unity of time in creating right which may be different, but in all cases unity of possession.

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exceptions for special reasons, viz.—the widow, the daughter, the mother, the grandmother. According to the Benares and Mithila schools the females above mentioned inherit only when the family is divided. In an undivided family females are not admitted as heirs, *Elberling*, 67, 68, unless on exhaustion of male undivided members, *Stra. Man.* § 353, except in Malabar and Carana.

There are two modes of devolution of property :—

1. From a sole separate owner.
2. From a female.

Property of an united owner cannot be considered as devolving upon the rest, they being joint proprietors by birth. In the second class the property will, in part, be affected by the rights of collateral sharers.

But even in undivided families, a widow takes the self-acquired property of her husband.

No daughter can claim until after a surviving widow.

Meaning of heritage.—In Hindoo law, *Heritage, Daya* signifies, that wealth which becomes the property of another solely by reason of relation to the owner, *Mitac.* ch. i. s. i. § 2.

Solely here excludes any other cause, such as purchase, or the like; and "relation," or the relative condition of parent and offspring, must be understood of that other person, a son or kinsman, with reference to the owner of the wealth, *Balam Bhatta, ib.* n.

Wealth which becomes the property of another, (as a son, or other person bearing relation,) in right of the relation of offspring and parent, or the like, which he bears to his father or other relative who is owner of that wealth, is signified by the term "heritage," *Subodhini, ib.* n.

Wealth includes in Hindoo law personal as well as real property, moveable as well as immoveable property, which is again divided into property, ancestral and self-acquired, and again into joint and separate. The distinction in our law between real and personal property does not exist amongst the Hindoos. Both species with them descend to the legal heirs. Their law of inheritance includes what with us forms the law of administration. Their law comprehends every possible claimant on the property of a person deceased, as well as any description of property of which, during his life, he was seised or possessed, 1 *Stra. H. L.* 126.

Wealth not re-united.—Wealth not re-united, nor put back again into a common stock, and still admitting of partition, is heritage. By not re-united, I mean to exclude wealth never before joint, and now first united for the purposes of gain, or the like; because the term, partition of heritage, does not apply to the dividing of [wealth] thrown together by merchants, *Mayukha*, ch. iv. s. ii. § 1.

In like manner we must also exclude re-united property, in the sense in which that term will hereafter be defined, even as we find

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in the *Smriti Sangraha:* "That which is received through a father, and that received through a mother, is described by the term heritage;" and in the *Nighantu*, it is said the learned define heritage to be wealth of a father which admits of partition. The word father is merely put to denote relations in general, as a part for the whole, *Mayukha*, ch. iv. s. 2, § 1.

RIGHT OF THE NATURAL FAMILY TO INHERIT PROPERTY ACQUIRED BY ADOPTION.—We may remark here that the natural family have no right to succeed to property on the death of an adopted son, which the latter has acquired by reason of his adoption. A member of a Hindoo family cannot as such inherit the property of one taken out of that family by adoption. The severance of a person adopted from his natural family is so complete, that no mutual rights as to succession to property can arise between them, *Sri Nevasa Ayyangar* v. *Kuppanyyangar; Rayan, Krishnamachariyar* v. *Kuppanayyangar*, 1 *Mad. H. C. R.* 180; affirming *S. A.* No. 1 of 1859; *M. S. D.* 1859, p. 81. The property in dispute was vested in one Janaki Ammal. She mortgaged it to Chechappa Nayakkan, the ancestor of the first, second, and third defendants. Janaki Ammal adopted one Ragava Aiyan, who died unmarried. The plaintiff, as brother of Ranga Aiyan, the natural father of Ragava Aiyan, sued to redeem this property, as heir of Ragava Aiyan in default of issue from him. The fourth defendant claimed to succeed as cousin of Janaki Ammal's husband, and the fifth defendant sues as foster son of Ranga Aiyan.

Mr Justice Strange, in delivering judgment, said the question is, Whether a member of a natural family can succeed to one taken out of the family by adoption? The settlement of this question depends upon whether the severance of the person adopted from his natural family is so complete that no mutual rights between them to property in succession, the one to the other, can arise; or whether the severance is not so thorough an one as to shut out such succession the one to the other, *M. S. D.* No. 15 of 1859, *supra*, the question came before the Sudr. Court, when it was sought to establish the succession of a person adopted to his natural brother.

The pundits, relying upon the reasoning of *Sri Pandita*,* asserted the right of succession did exist. But the Court, after examining the basis of their opinion, and other law authorities, thought that the adoption created an entire and irrevocable severance of him from his natural family.

We† are of opinion that the above decision is founded upon a just appreciation of the principle of adoption, whereby the son of one man ceases to be such in the eye of the law, and becomes the

* See *Menu*, ix. § 142; *Datt. Miman.* vi. § 6, 7; *Datt. Chand*, ch. ii. § 18, 19; *Sutherland, Adoption*, p. 229; *Mitac.* ch. i. s. xi. § 32; 3 *Dig.* 147, 148; *Vyavahara Mayukha*, ch. iv. s. v. § 21, 23.

† *Strange* and *Holloway, J.J.*

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son of another man, inheriting thenceforth in his adoptive family, and having no more rights in his own family. If it would be a violation of that principle to allow a person adopted to return to his natural family, and take up their rights, it would be a still greater violation thereof to introduce to the rights in the adoptive family the natural kindred of the adopted person, who assuredly never had any part or title in the adoptive family, or in their possessions.

We observe, furthermore, that in the *Mitacshara*, the great authority of this Presidency on the law of inheritance, no place has been given to the natural family for the introduction into the line of heirs of one taken out of that family by adoption, and none in the adoptive family for the admission of these in the natural family.

WHEN AN ADOPTED SON DIES WITHOUT ISSUE.—When an adopted son dies without issue, property which he has inherited from his adopted father goes to the natural heirs of the latter, *M. S. A.* No. 71 of 1858, *M. S. D.* 1859, p. 265.

WHETHER A MOTHER SUCCEEDING TO ESTATE OF HER SON TAKES BY WAY OF INHERITANCE.—In the case of a widow all the property falls strictly under the head of inheritance, so says the *Mitac.* But where widows succeed to their husband's property in default of sons, the course of decision in the Madras courts has ruled that she only possesses a life interest, and that after her death the property devolves upon her husband's heirs. If we are to consider the *Mitac.* as an authority, we may readily imagine various other cases where a woman may inherit, and the question may be fairly raised whether property inherited from other than a husband should not be classed in schools following the doctrine of the *Mitac.* under the head of *stridhana*. This has been doubted by the High Court of Madras in *Bachiraja* v. *Venkatappadu*, 2 *Mad. H. C. R.* 402, in an elaborate judgment, wherein the question was considered whether a mother succeeding as heir to her son took the estate by way of inheritance, and whether having so inherited, the property became her *stridhana*. The Court held that the estate taken by the mother was merely a life-estate, and that she had no power of alienation. With due deference to the opinions of the learned judges who examined the authorities most fully, we think that the mother took something more than a life-estate. She took as heir to her son, and not as widow to her husband. Because she succeeded to the estate of her son, it does not follow that that estate comprised any portion of her husband's property; and if it did not, the rule laid down by the High Court is without any principle to support it. If the whole estate inherited from the son had descended to him from her husband, she did not take from the husband at all but from the son. We have the express authority of the *Mitac.* ch. ii. s. xi. § 2, that property inherited becomes a woman's *stridhana*. A daughter may inherit from her father or from her mother, and a

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mother may inherit from her son. On what principle can it be contended that such property should be considered other than *stridhana?* The decision in question cites *Jim. Vahana* to show what the doctrine of the Bengal school is. No doubt the Bengal school excludes such property from *stridhana.* But the *Mitac.* is the authority which prevails in Madras. The *Smriti Chandrika,* ch. ix. s. i. § 3, cites *Yajnavalchya* in the same manner as the *Mitac.* ch. ii. s. xi. § 1; and among other modes of acquisition, any other separate acquisition is enumerated among a woman's property. The *Mitac.* explaining this says, wealth acquired by inheritance is *stridhana.* This is not a forced construction, for inheritance is certainly a mode of acquisition just as much as a gift would be. Suppose a son separated from his father died, leaving no issue or widow, the mother would succeed as heir in preference to the father, which arrangement clearly shows that she succeeds to her son's property perfectly independent of her husband. It is only in failure of the mother that the father would take, *Mitac.* ch. ii. s. iii. Could the husband deprive her of this property? If so, on what authority? If not, is it not her stridhana? In the absence, therefore, of any provision in the law we are inclined to consider that the doctrine of the *Mitac.* is based upon an intelligible principle. The decision of the High Court has been mainly influenced by the case of *Ramasami Mudelia* v. *Vellata, 2 Stra. Note of Case,* 211, decided by *Sir Thomas Strange* when C.-J. of Madras, holding that the mother did not succeed to the property of her son as her *stridhana.* The High Court observed that this was not the point directly in question; the case is therefore of no authority. The judges remark that the *Digest of Jagannatha,* a Bengal text-book, is the authority referred to in the decision, but that is no authority in a country governed by a different law. They observe that *Sir Thomas Strange* must have had the *Mitac.* in view when pronouncing the *doctrine,* because he referred to the *Mitac.* in a foot-note of his printed cases. It does not follow that because he referred to the *Mitac.* in his printed book that he had an opposite doctrine maintained by so celebrated a writer as the author of the *Mitac.* before him. Were such the case, when enunciating this *obiter dictum,* it might be expected that the learned judge would have given some reason for following a doctrine of a school of law which he was not administering at Madras. It is more probable that the *Mitac.* was referred to by way of caution against too great reliance being placed on the *dictum* in question, or that he discovered the passage in the *Mitac.* after he had pronounced his decision; and when publishing his book wished to draw judicial attention to it. On the whole, we do not think the decision of the High Court sufficiently satisfactory to overturn the doctrine of the *Mitac.* We are the more confirmed in this opinion by what *Mr Strange* says

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in § 316 of his *Manual* with respect to the descent of property devolving upon a female.

DEATH OPENS UP THE INHERITANCE.—The devolution of property arises either on natural or civil death; save in Bengal, the son is not a co-heir with his father, and inherits in the strictest sense of the word after the parent's death, *Narada*, 3 *Dig.* 474; 1 *ib.* 276. Among the Hindoos no new right accrues to the heir on the death of the father, for male issue from the very moment of birth are co-proprietors with the father, as regards ancestral property, on whose death only a larger development of share arises. If a father has four sons, by virtue of the vested right in the issue, any one of them may bring a suit for partition, in which case he would receive one-fifth of the ancestral property as his individual share; whereas if the partition took place upon the death of the father, he would get one-fourth of that property.

NATURAL DEATH.—Natural death consists of two classes—viz., 1. known; 2. presumed.

The instances where natural death is known are so familiar as to require no comment here.

PRESUMPTION OF DEATH.—Death may be presumed when the proprietor has been absent without tidings for a long period, or where he has voluntarily retired from the world by joining a religious community, 1 *Stra. H. L.* 131.

It is a common practice to go to Benares to die, and many persons are never heard of again. The sages consider that long absence is equivalent to death. The law has therefore assigned various periods of absence, varying from twelve years upwards, according to the age of the person at the time of his departure, within which, if he is not heard of, the heir may take possession, keeping certain fasts; then burning an image of his ancestor made of *cusa*, and performing for him his funeral rites. *Jim. Vahana*, ch. viii. 1 *Dig.* 227, 228; 3 *ib.* 450. In this case, where the heir is residing in a distant country, the inheritance is kept open to the seventh in descent from the person deceased, which is an extension of the rule limiting the right to the fourth in descent, *Jim. Vahana, ib. note, Vrihaspati*, 3 *Dig.* 441, 449; 1 *Stra. H. L.* 132.

The English law limits the period of absence to seven years. The Hindoo law varies the period according to the age of the absentee, twenty years for one between thirty and thirty-five; fifteen if between forty and forty-five, and twelve for one between sixty and sixty-five. See 1 *Stra. H. L.* 188, *post*, p. 230. *Macnaghten* says, After twelve years' absence death is presumed. In the English law the principle seems to be that a man who has any interest in the property would take care that his existence was made known, while with the Hindoos he has the benefit of being assumed to be alive during the ordinary duration of life.

CIVIL DEATH.—Civil death takes place when one has voluntarily

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retired from the world, by joining a religious community, 1 *Stra. H. L.* 184, 185. Crime, too, unexpiated, *Sir Thos. Strange*, p. 122, says, opens up the inheritance to the heirs. See also 1 *Stra. H. L.* pp. 148, 160, and "Disqualification for Inheritance" and "Partition." "Unexpiated," is presumed to mean so long as the sentence or punishment shall not have been completed.*

LOSS OF CASTE.—Formerly loss of, or degradation from, caste operated as a deprivation of the right of inheritance. But it has now no effect as a cause of civil death in matters of property. See Act xxi. of 1850, *Abraham* v. *Abraham, Moore's In. Ap.* 227. It is not necessary that the heir should have been actually born when the inheritance falls in. It suffices if he has been begotten and afterwards born alive. When born with vitality, it is of no moment how soon after he may die; the right of inheritance is acquired, and the inheritance devolves on the heirs of the child, *Elberling*, p. 40.

THREE CLASSES OF HEIRS.—There are three classes of heirs—viz., 1. *Sapindas*, a term derived from *Pinda*, the funeral rice-ball or cake, and those who participate in offering it to the deceased are called Sapindas. These also offer oblations of water; 2. *Samonodicas*, a term derived from *Oodaca*, water, and who offer water only, being of a remoter class of relationship with the deceased, and consequently excluded from offering rice-balls unless on failure of the sapindas. 3. *Bundhus*, a term which signifies cognate kindred lying beyond the *Samonodicas, Mitac.* ch. ii. s. vi. § 1; *Stra. M. H. L.* 308. These as such make no offerings unless on failure of the *Sapindas* and *Samonodicas*, when they make offering of the *Pinda*, as do the *Samonodicas* on failure of *sapindas*, *Stra. Man.* § 308.

The sapindas are of two grades—viz., the nearer and the remoter, the former of whom offer and partake of the rice-ball entire, the latter, who offer and partake of merely the wipings of the hands. The *Samonodicas* also are divided into two grades, but there is no distinction between them as to the offerings they make, *Menuvurtha Mooktavalee on Menu*, v. § 60.

LIMIT OF SAPINDAS.—The nearer sapindas are the three in direct descent from the person to be traced from, and the three in ascent above him and their descendants to the second degree, *Smriti Chandrika*; also the wife, daughters, daughter's sons, mother, and paternal grandmother, *Smriti Mooktha Phalum*. The limit is the grandson of the great-grandfather. The rest are the remoter sapindas, *Stra. Man.* § 311.

THE SAPINDA EXTENDS TO THE SIXTH IN DESCENT.—They extend to the sixth male in direct descent from the person to be traced from, and the sixth male in direct ascent, and the direct male descendants of these latter to the sixth degree, *Stra. Man.* § 300. The brothers and their male descendants to the fifth degree come in thus as the descendants of the father, or the first in direct ascent.

* It is doubtful whether in the present day the doctrine would be maintained.

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The wife, daughters, and daughter's sons, the mother, and the paternal grandmother are also embraced among the sapindas, *Saraswatee Valasa; Varada Rajeyum; Smriti Mooktha Phalum.* The female line extends no further. The remotest embraced in the line of sapindas is the four times great-grandson of the four times great-grandfather, *Stra. Man.* § 310.

LIMIT OF SAMONODICAS—Extends to the sixth male below and the sixth above the male *sapindas*, and the direct male descendants of the latter six to the sixth degree, *Mitac.* ch. ii. s. v. § 6 ; *Smriti Chandrika ; Smriti Mooktah Phalum ; Stra. M. H. L.* 312.

Mr Strange, in his *Manual*, § 313, says the collaterals in the above list are brought in on the principle that they have some common ancestor with the person to be traced from, to whom they, as well as he, offer oblations, this constituting participation in offering.

BUNDHUS.—The *Bundhus* are of three kinds—viz., such as are in parallel grade to the individual himself, who are the sons of his own father's sister, the sons of his own mother's sister, the sons of his aunt, and the sons of his mother's maternal uncle must be considered as his own cognate kindred ; such as are parallel to his father, who are the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be deemed his father's cognate kindred ; and such as are parallel to his mother, who are the sons of his mother's paternal aunt, the sons of her maternal aunt, and the sons of her maternal uncles, *Mitac.* ch. ii. s. vi. § 1 ; *Stra. M. H. L.* § 214.

The following enumeration of heirs shows the order in which each class of relations takes direct from the person to be traced from. It is not an order according to which each succeeds to the other. On the property coming to an individual, the descent would commence afresh in his line, and will fall upon his own immediate heirs.

For example, should the inheritance devolve upon a brother's son, in default of nearer relatives, his heir would not be the paternal grandmother of the person from whom the property came. It would descend primarily to the new inheritor's male issue, and so onwards ; and should it devolve on a female relative, for instance on a daughter, it would go on from her according to the rule of descent in the female line to be hereafter explained, *Stra. Man. H. L.* § 316.

Madras.

Sons.
Sons' sons.
Sons' grandsons.
Widow.
Daughters.
Daughters' sons.
Mother.
Father.

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Brothers.
Brothers' sons.
Paternal grandmother.
Paternal grandfather.
Paternal grandfather's sons, (*i.e.*, the uncles.)
Paternal grandfather's son's sons, (*i.e.*, the cousins.)
Paternal great grandfather.
His sons.
And sons' sons.

After those, the remoter sapindas come in, each in their order, and then the samonodicas in their order, and, lastly, the bundhus in theirs.

In Bengal, in default of brother's grandsons, the sister's son inherits, but not in the provinces which follow the *Mitac.*

In *Elberling's Treatise on Inheritance* it is laid down that sons of different sisters take according to the number born, as well as unborn, and even unbegotten at the time of their uncle's death.

Elberling is a Bengal authority, but discusses the authorities of the Benares school as well. He says also that, according to the schools of Benares and Mithila, they, sisters' sons, are excluded, as they belong to a different family, see *post.*

For the order of succession in Bengal school, see *post*, 300.

For that of Bombay, see *post*, 304.

For that of the Mithila school, see *post*, 304.

For that of Malabar and Caranese schools, see *post*, 306, 309.

In the case of a sole separate owner no question of collateral heirs can arise until the lineal descendants are first exhausted.

In the case of an undivided owner being a co-heir, his property will in part be affected by the rights of collateral sharers.

The direct descent does not in general go beyond the putthar, except where one of them is absent without tidings, and then his lineal descendants to the sixth degree may claim the inheritance.

SECTION II.

Male issue—In default of—Adopted son—Law applicable to both alike—Issue includes sons, grandsons, and great-grandsons—When death presumed from absence—Performance of obsequial rites—Keystone to the law of inheritance—The grandson—Benefit to the soul of the ancestor is not the only principle—The mere act of solemnising exequial rights gives no title to inheritance—By birth proprietor with his father—Heirs persumptive and apparent— Civil death—Sons born after partition—Illegitimate issue, Soodras—Sons of Englishman by Brahmin woman separated from husband—Marriage with bastard's daughter—Bastard's right to maintenance—Soodra bastard's right to inheritance—Rebuttability of presump-

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tion of legitimacy when opportunity for sexual intercourse—Right of a son by a female slave—Illegitimate sons of Kshetriya upon a Soodra caste—Entitled to maintenance—Minor—Undivided family—Primogeniture—Public and private property of a rajah—Evidence of descent of zemindar's estate—Self-acquired property.

MALE ISSUE.—The first in order of Hindoo heirs is a man's legitimate male issue. The legitimate son is one procreated on a lawfully wedded wife, *Mitac.* ch. i. s. xi. § 1.

IN DEFAULT OF—ADOPTED SON—LAW APPLICABLE TO BOTH ALIKE.—In default of such issue, a legally adopted son becomes such heir, see Adoption. As between issue of the body and an adopted son, the Hindoo law of inheritance makes no difference. The adopted son, however, takes the entire estate only in the event of the failure of a legitimate son, and as the adopted is a substitute for such son, he succeeds to his adoptive father's estate exactly as if he were a legitimate son, the law of inheritance being equally applicable to both.

Where the sons may have divided from their father, and received their portions, they nevertheless succeed to their father's remaining property as first in descent, 1 *Stra. H. L.* 183 ; *Stra. Man.* § 317.

ISSUE INCLUDES SONS, GRANDSONS, AND GREAT-GRANDSONS.—In Hindoo law the term "issue," includes not only all the sons a man leaves behind him, but son's sons also, or sons of the latter, or great-grandsons, *i.e.*, the sons, the grandsons, and great-grandsons, 1 *Stra. H. L.* 124. The whole have by the Hindoo law ever constituted but one heir, so that if the son have died in the lifetime of his father, leaving a son, and that son also dies leaving one, and then the great-grandfather dies, the great-grandson succeeds as his grandfather would have done had he survived; and according to *Vaijayante*, a commentary on *Vishnu*, the right of representation in all these cases vests likewise in the widow; but according to other authorities she is only entitled to maintenance, to be supplied her by her father-in-law, and on his death by his heir. But here, as far as the fourth in descent, the right of lineal representation stops, unless there has been an absence in a distant country ; when it extends beyond the fourth, as far as the seventh degree, *Vrihaspati*, 3 *Dig.* 441, 448 ; 1 *Stra. H. L.* 124, 188.

GREAT-GREAT-GRANDSONS.—So that supposing the intermediate descendants to have failed, and a son of the great-grandson to survive at the death of the proprietor, he would not inherit, save as a mere remote sapinda ; but the widow of the deceased, the next in the series, would succeed in preference, though in the event of the great-grandson surviving his ancestor, and then dying, the property so inherited by him would devolve upon his son, in consequence of its having vested in the father, 1 *Stra. H. L.* 125.

The grandsons and great-grandsons inherit *per stirpes.*

WHEN DEATH PRESUMED FROM ABSENCE.—Where the death of

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the owner is presumed from absence unheard of, and his descendants also are absent and unheard of, any of them, up to the sixth from him, on appearing, will be entitled to inherit as of the male issue, taking precedence of the widow, 1 *Stra. H. L.* 125. The inheritance is kept open to the remotest *sapinda* in this branch, on the presumption that an intermediate descendant may have survived to transmit it to him, *Stra. Man.* § 324. See *ante*, pp. 75, 226.

PERFORMANCE OF OBSEQUIAL RITES—KEYSTONE TO THE LAW OF INHERITANCE.—The keystone of the whole Hindoo law of inheritance is the birth of a son, in which event the father is delivered from Put, and if he have no son he is required to adopt one whose adoption effects the same deliverance. The table of descent is clearly laid down in the various schools of law. No one has a right to succeed or perform the funeral rites, except a person enumerated therein, and in the order established. It is the position that he occupies in the table that gives the right to inheritance which is rather subject to the duty of performing the funeral ceremonies of the deceased.

The series of heirs is naturally adjusted by the amount or degree of benefit which each is supposed to confer upon the deceased. The son is preferred because he presents the greatest number of beneficial offerings, and he saves his parent from Put, *Jim. Vahana*, ch. iv. s. iii. § 36; 1 *Stra. H. L.* 128.

THE GRANDSON.—The same degree of efficacy is attributed in default of their respective fathers to the grandson and great-grandson, which reaches the fourth in descent, but not beyond, for *Menu* says, ch. ix. § 186, "But the fifth has no concern with the gift of the funeral cake."

Accordingly some benefits are derived from the great-grandson as well as from the son. The term son, in the text of *Menu*, or in that of *Vishnu*, or in that of *Yajnavalchya*, &c., extends to the grandson, for as far as that degree descendants equally confer benefits by presenting oblations of food in the prescribed form in monthly obsequies, *Jim. Vahana*, ch. xi. s. i. § 34, 36, and this accounts for representation stopping with the great-grandson.

In *Jim. Vahana*, it is said, accordingly, Since inheritance is in right of benefits conferred, and the order of inheritance is regulated by the degree of benefit, Srikrishna, the equal right of the son, the son's son, and the grandson, is proper for their equal pretensions, are declared in the text. By a son a man conquers worlds, &c., *Jim. Vahana*, ch. xi. s. i. § 31, and in other similar passages, see 1 *Stra. H. L.* 127, 128, where it is said, upon this principle ministering equally to the peace of their departed ancestor, if he leave a son, and the son of a son, and the son's son of a third son, they take equal shares of his estate because they confer the benefit equally, *Jim. Vahana*, ch. xi. s. i. § 36, 40; *ib.* s. vi. § 29.

BENEFIT TO THE SOUL OF THE ANCESTOR IS NOT THE ONLY PRIN-

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CIPLE.—This benefit to the soul of the ancestor, although it is the general, is not the sole and universal principle; payment of the ancestor's debts as well as nearness of kin, or proximity by birth also, form considerations in the Hindoo law of inheritance, 3 *Dig.* 501, 525, 533; 1 *Stra. H. L.* 129; *Menu,* ch. v. § 60.

And although the table of inheritance, on failure of the great-grandson, opens up the succession to the widow, yet the property reverts to the lineal kindred; at all events, as far as the seventh person, or the sixth degree of ascent or descent, 3 *Dig.* 624; *Menu,* v. § 60; *Jim. Vahana,* ch. xi. s. i. § 42; 1 *Stra. H. L.* 129.

The right to inherit is therefore connected with the power to benefit, so that the title of a son lawfully begotten on a wedded wife is preferred before any other heir, which accounts for the anxiety of a Hindoo for male issue, or his substitute by adoption.

THE MERE ACT OF SOLEMNISING EXEQUIAL RITES GIVES NO TITLE TO INHERITANCE.—But it is not to be concluded, therefore, that the rights of inheritance and performance of obsequies go together, otherwise it might be assumed that the mere act of solemnising the funeral rites would give a title to the succession which would create a scramble for priority amongst conflicting claims. All the rule establishes is, that the person being the nearest of kin, the most competent, is bound to the due performance of exequial rites for the benefit of the deceased to whose property he has succeeded. The performance of funeral rites by an individual, not in propinquity of relationship to the deceased to qualify him for the act, will not confer on him the right to inherit, 1 *Stra. H. L.* 129; *Stra. Man.* § 305, for such performance of funeral rites is only evidence of a nearer relationship, and may therefore be always rebutted by other evidence. In a case where a widow died, leaving a daughter and a brother her surviving, and the brother performed the widow's funeral ceremonies, it was held that the daughter was entitled to the estate, *Colebrooke* remarking that the brother's pretensions were founded on passages of Hindoo law, purporting that the succession to the estate and the right of performing obsequies go together. referring to remarks on *Dutnaram Sing* v. *Buckshee Sing, Beng. R. ante,* 1805, p. 22; see also *Mitac.* ch. ii. s. ii. § 6; 2 *Stra. H. L.* 236.

Female relatives, to a very limited extent, may offer funeral oblations. They do so by proxy—it not being permitted to them to recite passages from the Vedas, *Stra. Man.* § 306. See *Elberling,* 67.

BY BIRTH HINDOO CO-PROPRIETOR WITH HIS FATHER.—By birth every Hindoo is a co-proprietor with his father in his ancestral property, 1 *Stra. H. L.* 17.

By birth he acquires a vested interest in the property, *Mitac.* ch. i. s. i. § 23, 27, and note 23; *Subodhini.* But the extent of that interest is a question discussed in the Hindoo books, and upon which differences of opinion exist in the various schools.

In Bengal inheritance is defeasible during the life of the father

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by gift or other alienation, including will, requiring the concurrence of the sons only in the instance of land inherited, 1 *Stra. H. L.* 21, though valid without it, *ib.*

In Benares and Southern India his power of alienation was more limited. The power of alienation may be anticipated by partition, without the consent of the father, if warranted by law, or voluntarily on his part, according to the doctrine of all the schools.

Sir Thomas Strange says, vol. i. *H. L.* p. 130, This power, however, may be limited by adverse possession in a stranger for twenty years, citing *Yajnavalchya*, 1 *Dig.* 135 ; *Vyasa and Vrihaspati*, 3 *ib.* 443, 442. But *Mr Ellis*, 2 *Stra. H. L.* 27, denies this to be the law of Southern India. He says *Vignyanaswara*, after a long argument, ruled that it is the perishable produce only of land that cannot be recovered after the expiration of twenty years, and of other property after ten years, such land or other property having been enjoyed to the exclusion of the owner by his default or in his view. With regard to land, he holds that if legal acquisition can be disproved, even after the expiration of a hundred years, (considered as the measure of the life of man,) ownership is not established by possession, and he accordingly declares that "even beyond the period of memory, if there exist a current tradition of the illegality of the acquisition, the enjoyment is not valid." And it is observable that, to render it so in any case, it must have been in view of the owner. In fact, according to the original and correct doctrine of the Hindoo law, enjoyment or possession can never be cause of ownership; it is a presumption of it only, but if the want of original title can be shown, the possessing holder may at any time be divested of the property. This applies not only to land but to property of every description. The Hindoo canon is, "Acquisition must be shown ;" all else is exception. *Menu* says, "He who enjoys without ownership for many hundred of years, the lord of the earth shall inflict on that criminal the punishment ordained for thieves."

Of course these rules are subject to the law of limitation, Act xiv. of 1859.

Heirs presumptive and apparent.—The Hindoo law recognises the distinction of heirs known in English law as apparent and presumptive. With the Hindoos they are styled Heritages not liable to obstruction, and liable to obstruction. The former are called *Apratibandha*, answering with us to the heir-apparent, whose right, if he outlive his ancestor, is indefeasible, 1 *Stra. H. L.* 131. The latter is called *Sapratibandha*, those remoter heirs, as brothers, uncles, &c., whose right is liable to obstruction by the intermediate birth of nearer ones, so that their title is not apparent but presumptive only, *ib.*

Several wives.—Sons equal in number by each inherit by representation according to their mothers, 1 *Stra. H. L.* 205.

Sons born after partition.—Where sons are born after the

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partition, they succeed to the father's share to the exclusion of the divided sons, 1 *Stra. H. L.* 182; so if there be no after-born son the divided sons succeed as heirs to their father's share, provided their father's wife be not living, *post*, p. 328.

All sons get equal shares, and not according to the mother's. But in some parts the mothers represent equal shares, and their sons get equal parts of these shares.*

ILLEGITIMATE CHILDREN.—By the Hindoo law illegitimate children do not inherit unless in the Soodra class, see *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn*, 7 *Moore's In. Ap.* 18, *post* p. 241. They are, however, a charge upon the inheritance, *Menu*, ch. ix. § 178, 179; 3 *Dig.* 143, 283, and are entitled to maintenance. Even among Soodras, if there are illegitimate sons, daughters, or sons of daughters, they get only half of what they would have got had they been legitimate, the rest being shared among the legitimate children, 1 *Stra. H. L.* 69.

In No. 124 of 1861, a question arose whether the grandson of a divided uncle took along with, or in preference to an illegitimate son. The decision was that he did neither—the decision giving no further claim on the brother's property. *Sir Thomas Strange* says, in one description of the *Pauner Bhava*, or son of a twice married woman, which occurs still in some instances of the fourth order, illegitimate sons continue to participate with legitimate ones if there be any, and if there be none, nor daughters, nor daughters' sons, they are then not distinguishable in point of inheritance from legitimate ones, *Mohun Sing* v. *Chumun Rai*, *Beng. Rep. ante*, 1805, p. 30; 1 *Stra. H. L.* 132.

THE STATUS AND RIGHT OF THE SONS OF AN ENGLISHMAN BY A BRAHMIN WOMAN LIVING APART FROM HER HUSBAND.—When a Brahmin woman residing apart from her husband lived with an Englishman, and had two sons by him, it was held that the sons are Hindoos, and that their rights are determined by those of the class of Hindoos to which they belong, and that they are to be regarded as *Soodras*, or as a class still lower, and that in the absence of preferable heirs they inherit the property of the mother, and of each other; if not, she is a mere prostitute, and of the cognation or relationship between her and her offspring there exists no doubt whatever, *Myna Bai* v. *Uttaram*, 2 *Mad. H. C. R.* 196.

This was an appeal in pursuance of leave reserved to the respondents in the case of *Myna Bai* v. *Uttaram*, by the decree of Her Majesty in Council, dated 30th Nov. 1861, 8 *Moore's In. Ap.* 425.

The appellants were the plaintiffs in ejectment, the first being the widow, and the other devisees under an alleged will of the late Ramaparsad. The only question argued was the validity of Ramaparsad's title, claiming as he did under Taukaram, with being

* Putnibhaga, the term applied to this mode of division, receives no countenance from the High Court of Madras.

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illegitimate sons of a Hindoo married woman of the Gauda Brahmin caste, by Hughes an Englishman. It was admitted on behalf of the plaintiffs that it could not be pretended that any special custom existed; the right of Ramaparsad to succeed was therefore put upon the general ground of Hindoo law.

The Court (*Phillips and Holloway, J.J.*) in delivering judgment said, "For the plaintiff it was contended that the case is one of first impression, that it is really that of a prostitute, and § 363 of *Strange's Manual* shows that there is heritable blood between the degraded mother and her children, that the property is self-acquired, and that there is no text whatever of Hindoo law which includes inheritance between persons so situated; that Taukaram and Ramaparsad were brothers, that in default of issue the mother succeeds to her sons, and that Ramaparsad's right to succeed to his brother would devolve from her; that the right of children of professional prostitutes to succeed to their mother has been frequently recognised.

"On the other side, it was contended, quoting 1 *Stra. H. L.* 160, that the mother and the children, too, were altogether beyond the pale of Hindoo law, that she was *civiliter mortua*, that her rights had altogether ceased, and that she could not acquire or transmit rights; that this was the fruit, not only of illicit, but adulterous intercourse, and that there could be no possibility of inheritance."

No authority was quoted on either side here, or in the Privy Council.

"The lords of the Judicial Committee have determined that these persons have been rightly considered to be Hindoos, and the question of their right is to be solved by the determination of the class of Hindoos to which they belong, and the rules as to inheritance which exist in that class. If, however, from the anomalous circumstances of this case, they cannot be, with positive certainty, referred to any particular class, it seems to us that we are bound to reason analogically, and apply to them the rules observable by classes to whom their class bears the greatest likeness." On the question of the issue being adulterous the Court said, "There is no doubt that mere adultery, if committed with a man of the woman's own caste, would be expiable. The husband might put her away, but would be by no means bound to do so. The ancient law is clear upon this subject, *Menu*, ch. xi. § 177, 178, prescribes the penance for adulterous connexion. The provisions as to the son of concealed birth (*quæsitus filius*) being entitled to inheritance of the husband of the mother, *Dig.* § 249, 250, show clearly that mere adultery is not the disabling stigma which codes based upon Christianity have made it. Still more curious is the conflict of opinion developed by the commentator in the succeeding clauses as to the proper paternity of the child begotten upon the wife of another, (*ib.* 252, 253, with notes.) The fact that the procreator of those children was impressed with a peculiar status preventing his illegitimate children from inheriting to him, renders it unnecessary

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to pursue this investigation, and we have only adverted to it to show that the mere fact of adultery is of very little importance to the present investigation. In the view of Hindoo law those children were stained with a blot wholly indelible, and in comparison with which the mere adultery of the mother fades away. On this evidence she must be taken to have been what is termed a Gauda Brahmin, really the product of the union of a Brahmin with a Kshetriya woman, and according, then, to the theory of *Menu*, of a caste intermediate between the two first regenerate classes. She must be taken, therefore, to have been at least a *Kshetriya* in rank. As to the father, he was not a Hindoo at all."

"Looking at *Menu*, ch. x. § 44, where he enumerates the races, once *Kshetriyas*, who have from non-communion with Brahmins, and their omission of holy rites that are there prescribed by the *Shastras*, sunk to the lowest of the four classes, it is probable that they would have considered this man of the Caucasian race in the position of a Soodra. If not a Soodra, he was in the eye of Hindoo law, a man of no caste at all, a Meleecha or foreigner." By such connexion the woman became hopelessly outcaste, and it must be assumed that she was treated as dead to the family of her husband; and as *Abbé Dubois* justly points out, that the person so sunk from caste does not descend to any lower caste, but becomes altogether outcaste. The mother must be taken to be a woman of no caste, living in prostitution. "Certainly there are many passages of text writers who recognise the relationship of the son irregularly begotten, to his mother's family, *Yajnavalchya*, quoted in the *Vivada Chintamani*, p. 283, "A damsel's child is one born of an unmarried woman; he is considered as the son of his maternal grandsire." This passage clearly recognises the mother and her son irregularly begotten as cognate, and the *Mitacshara*, quoting *Menu*, (ch. i. s. xi. § 7,) points out, that if the girl is married, the child, although not begotten by the husband becomes his own. The authorities already referred to as to the son of concealed origin also bear upon this point, and seem to show clearly that the Hindoo law, although not recognising as the husband's son one got by a man of unequal class, nevertheless gives no ground whatever for supposing that the circumstance of illicit birth severs the union between the mother and her son so as not to admit of heritable blood between them. This being so, there seems no ground either on authority or analogy for contending that if Taukaram had died without issue his mother would not have succeeded to him even if she were a Soodra, or of a class still lower, as we think she was."

"That the illegitimate issue of women of the lowest Hindoo classes daily succeed to property, both of their mothers and of each other, without question or dispute, we can upon our own experience affirm. It would be illogical if it were otherwise, for the illegitimate son of a Soodra, in the absence of preferable sons, is his heir."

"We may refer by way of analogy to the practice of Malabar and

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Canara. There concubinage is the rule, and the whole law of inheritance is based upon the existence of heritable blood between the mother and son, quite irrespective of the father. There is no agnation at all."

"There is very little authority upon the question now at issue. All the passages in the text-books have reference to the right of inheritance, *ex parte paternâ*. The case quoted from the younger *Macnaghten* in the Privy Council is of that character. The doctrine in *Stra. Man.* § 363, is fully borne out by the doctrine in the case quoted, *Tara Munnee Dossea* v. *Motee Buneanee*, 7 *Sud. D. U.* 273. It was a suit by a daughter born in wedlock, of a mother who afterwards lapsed into prostitution, to recover from the daughters born in prostitution the property of the mother. The Court held that the plaintiff's title was not made out, because the conduct of the mother had severed her from her natural family, so that the plaintiff, her daughter born in wedlock, could not succeed to her." "In Madras, too, it has never been doubted that the children of the prostitute succeeded to the property of the mother."

"We have been unable to find the least authority for an opinion of *Mr Justin Strange*, that the children must be adopted children." "Our reasoning, therefore, is, that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Taukaram and his brother are decided to be Hindoos. They are Hindoo sons of a woman who was either a woman of a class lower than the fourth of *Menu's* classes, and in this case the sons are cognate to her and to each other, as the children of a class not twice born out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father because he is not a Hindoo at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever."

There is no analogy between the law of England with regard to bastards and the Hindoo law. The Roman law, however, which still dominates over all systems of European law, *non ratione imperii sed rationis imperio*, has dealt with the question. *Gaius* says, *Dig. Tit.* viii. fr. 2, "*Hâc parte* (that is, of the edict) *proconsul naturali æquitate motus omnibus cognatis permittat bonorum possessionem quos sanguinis ratio vocat ad hereditatem licet jure civili deficiant. Itaque etiam vulgo qusæiti liberi matris et mater talium liberorum item ipsi fratres inter se ex hâc parte bonorum possessionem petere possunt quia sunt invicem sibi cognati.*" This great master considers that in not denying the natural relationship between the erring mother and her sons, and of the sons with each other, and admitting heritable blood between them, the *prætor* was moved by natural equity."

At fr. 4 of the same title, "*Si spurius intestato decesserit jure consanguinitatis aut agnationis hereditas ejus ad nullum pertinet quia consanguinitatis et agnationis jura a patre oriuntur proximitatis*

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autem nomine mater ejus aut frater eâdem matre natus bonorum possessionem ejus ex edicto petere potest."

Ulpian points to the true distinction, and one which precisely meets the present case, and is in entire conformity with the doctrine of the Hindoo law. As agnation and consanguinity are the offspring of a marriage by the *jus civile*, no spurious son can have them; but he is related to his own mother and to his brothers by that mother.

Justinian, Inst. iii. *Tit.* v. 4, embodies the same rule, which by later legislation he modified.

The decision recognising heritable blood between illegitimate brothers, and between them and their mother, appears, in the absence of a *lex loci*, to be justified by the texts cited from the Roman jurists. But we do not agree with the learned judge that among Hindoos adultery is regarded in a less serious light than among Europeans. The texts of law cited to show that adultery is capable of expiation refer simply to spiritual punishment, which there is reason to believe was inflicted in all ages in all countries for the offence; but neither the texts themselves, nor the existing feelings and customs of the Hindoos, justify the conclusion. They are not more disposed to overlook adultery in their females than other people. With respect to the texts referring to sons of unmarried damsels, or sons of concealed birth, the Hindoos themselves would be the first to deprecate the possibility of being bound by such obsolete law.

MARRIAGE WITH BASTARD'S DAUGHTER—BASTARD'S RIGHT TO MAINTENANCE—SOODRA BASTARD'S RIGHT TO INHERIT—REBUTTABILITY OF PRESUMPTION OF LEGITIMACY WHERE OPPORTUNITY FOR SEXUAL INTERCOURSE.—The Hindoo law, independently of special usage or custom, does not make illegitimacy an absolute disqualification for caste, so as to affect in the relations of life not only the bastard, but also his legitimate children.

The Hindoo, unlike the English law, recognises a bastard's relation to his father and family.

By birth, and without any form of legitimation, bastards of the three twice-born classes are now recognised as members of their father's family, and have a right to maintenance.

In the case of Soodras, the law has been, and still is, that bastards succeed their father by right of inheritance.

The presumption of legitimacy where there has been opportunity for sexual intercourse, is not irrebuttable, *Pandaiya Télaver* v. *Puli Télaver*, 1 *Mad. H. C. R.* 478.

This suit was brought to recover possession of a zemindary estate from the original defendant, who claimed it as an undivided brother and heir of the late zemindar, Indiram Ramasvami Télaver. The zemindary is one which descends according to the rule of primogeniture, and the right of the plaintiffs to recover depended upon the proof and validity of the title of the first

plaintiff as the only legitimate son of the late zemindar by his second wife, (the second plaintiff,) his first wife having, as alleged by the plaintiff, borne him no issue, and been put away for improper conduct, and having afterwards married a second husband, by whom she had a son. The original defendant, in answer, said that the family of the second plaintiff was of a lower and inferior caste to that of his deceased brother, and that the females of it have been living in concubinage, without lawful marriage; that the father of the second plaintiff was illegitimate, and the second plaintiff consequently was of no caste; and that, according to Hindoo law, a marriage neither did nor could take place. But he admitted the marriage of his brother to the woman stated by the plaintiff to be his wife, but that she was divorced for want of chastity, and bore his brother no issue. The son of the first wife, and his grandmother as guardian, (his mother being dead,) being made supplemental defendants, denied the plaintiff's title, and asserted that the charge of unchastity of the first wife, and that she was put away and married again, were false, and set up the title of her son as heir.

The civil judge ruled that the family of the late zemindar and the second plaintiff were of the same caste, that a marriage had taken place with her, and that the zemindar and she had lived together, that he had in all respects treated her as his wife, and that the first plaintiff was the issue of their union; but held, on the authority of a Suder Court pundit, that in law, there was no valid marriage, as the father of the second plaintiff was illegitimate; that she was therefore a person of no caste; that the late zemindar and the sons of the Shastra caste could not contract a legal marriage with her; and that the first plaintiff therefore had no title to the property.

This decision was appealed from, and the Court held that a marriage in fact had taken place, and that the second plaintiff was not the concubine of the deceased.

Scotland, C. J., in delivering judgment said, with reference to the point raised, as to the validity of the marriage, on the ground of caste, The case presented by the defendant is, that the second plaintiff's father is shown to be the son of a zemindar of Pambuli, by a concubine of an inferior caste; and the second plaintiff therefore of no caste. . . . . As the decree of the civil judge rests upon the legal effect of the illegitimacy, we will, assuming it proved, express our opinion as to whether it was, in Hindoo law, a disqualification invalidating the marriage. The Civil Court appears to have decided that illegitimacy of the father placed him without the pale of the caste of his parents, and consequently his daughter, (the second plaintiff,) was destitute of caste, and that a valid marriage could not take place between the late zemindar, (he being of a caste that conformed to the Shastras,) and a woman of no caste.

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It is unnecessary to make a distinction somewhat refined, and which would be difficult to ascertain, between a caste of Soodras, conforming in all respects to the Shastras, and one that did not so conform, as was the case with the caste of the late zemindar. There appears to be no satisfactory ground for the proposition, that as respects either caste, the Hindoo law, independently of special usage or custom, makes illegitimacy an absolute disqualification for caste, so as to affect in the relations of life not only the person who is illegitimate, but also his legitimate children. . . . . I am not aware that any authority can be found for the proposition; and in principle and reason, looking to the rights of property possessed by illegitimate persons, the law would appear to be otherwise. The Hindoo law does not, like the English law, consider an illegitimate person *quasi nullus filius.* It recognises his relationship to his father and family, and secures him substantial rights.

Under the ancient law, it seems that at one time, in the case of the three superior or "regenerate tribes," sons not born in lawful marriage had rights of inheritance subsidiary to the "*Aurasa*," or son of a lawful wife, and could perform obsequies, *Menu.* ch. ix. § 159, 160, 180; *Mitac.* ch. i. s. 11; 2 *Stra. H. L.* 194, 211; and although this, as a general law applicable to those tribes, has, in respect of inheritance, become obsolete; yet it is clear law at the present day, that by birth, and without any form of legitimation, illegitimate children of these tribes are recognised as members of their father's family, and have a right to maintenance. It is also equally clear, that in the case of Soodras, the law has been, and still is, that illegitimate children succeed their father by right of inheritance, *Mitac.* ch. i. sec. 12; 1 *Stra. H. L.* 132.

While such is the law as to family estates and rights of an illegitimate child, it would be anomalous and inconsistent that illegitimacy should be declared to be a taint and disqualification for the membership of caste in the individual and children; so to decide in this case would, in effect, be giving to illegitimacy, as a disqualification, an operation which it would be contrary to the spirit, if not the letter, of legislative enactment, (see Act xxi. of 1850,) to allow to degradation from caste.

It is not to be understood, that supposing the late zemindar and the second plaintiff had been of different castes, the marriage would have been invalid. The general law applicable to all the classes or tribes does not seem opposed to marriage between individuals of different sects or divisions of the same class or tribe; and even as regards the marriage between individuals of a different class or tribe than himself, the law appears to be no more than directory, although it recommends and inculcates a marriage with a woman of equal class as a preferable description; yet the marriage of a man with a woman of a lower class or tribe than himself, appears not to be an invalid marriage, rendering the issue illegiti-

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mate,* *Menu.* ch. iii. § 12, *et seq.; Mitac.* ch. i. s. xi. § 2, and note; 1 *Stra. H. L.* p. 40. According to this view of the law, there being no proof of a special custom or usage, the marriage would be valid even though the parties had been of different sects or caste divisions of the fourth, or Soodra class.

It becomes necessary to determine whether the alleged heirship of the first supplemental defendant is well founded; for if so, he would be entitled to succeed, and the first plaintiff would fail in making out his title; and here the question of legitimacy depends upon paternity. The presumption arising from the fact of the first supplemental defendant's birth, after his mother's marriage with the late zemindar, has been rebutted, and his legitimacy disproved.

Holloway, J.—That the son of a Soodra, and of a woman between whom there has been no formal ceremony of marriage, inherits to the Soodra, is clearly shown by the authorities quoted in 7 *Moore's In. Ap.* 49,† and the decision of the Judicial Committee, that the illegitimate son of Kshetriya could not inherit, went precisely upon the ground that the father was one of the twice-born tribes. The whole tenor of the judgment shows, that if the father had been a Soodra, the son's right to inherit would have been questionable. It follows that the illegitimate son of a Soodra is not an out-caste.‡

The presumption of legitimacy, where there has been opportunity for sexual intercourse now is, that it is not an irrebuttable presumption of law, but that it may, like other presumptions, be rebutted either by direct evidence or by contrary presumption, *Morris* v. *Davis*, 5 *C.* and *F.* 163. It was also held, following a doctrine of Lord Eldon, that the conduct of the parties and their treatment of the child are admissible, and most material evidence upon the question.

See the observations on this case under the head of Partition.

Right of a son by a female slave—Illegitimate son of a Kshetriya of a Soodra caste.—An illegitimate son of a Kshetriya, one of the three regenerate castes, by a Soodra woman cannot, by Hindoo law, succeed to the inheritance of his putative father.

Entitled to maintenance.—He is, however, entitled to maintenance out of the estate. It would be otherwise if he were the son of a Soodra, as the illegitimate children of that caste are entitled to succeed to the inheritance of their father, *Chuoturya Run Murdun Syn* v. *Sahud Purhulad Syn*, 7 *Moore's In. Ap.* 18.

This was a case of the disputed succession to the rajdom and zemindari of Ramnagger in Bengal. The Rajah last seised, (the putative father of the appellant,) was a Rajpoot of the Kshetriya

* This is recognising obsolete law.

† *Sir W. Macn. H. L.* p. 18, p. 15, n.; *Mitac.* ch. i. s. 12; *Jim. Vahana*, p. 151; *Datt. Miman.* s. ii. § 26; *Datt. Chand.* s. v. § 30; 3 *Dig.* clxxiv. p. 143; 1 *Stra. H. L.* 69, 132; 2 *ib.* 168; *Vencataram* v. *Venata Lutchemee Ummal*; 2 *Stra. N. of Cas.* 305.

‡ We doubt this.

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caste. The Rajpoots of Central India, and in the district where the Rajdom Ramnagger is situate, are of the Kshetriya caste, and the right of succession to the Raj is to be determined by the laws and customs of that class.

The question raised in this case was the right of illegitimate children to succession under the Hindoo law of inheritance.

This law, it appears, varies according to the different classes of Hindoos. It is necessary, therefore, in the first place, to consider what these classes are, and where they are to be found.

The law relating to the right of succession of illegitimate children is thus stated in the first volume of *Sir W. Macn. Prins. H. L.* 18. "Amongst the sons of the Soodra an illegitimate son by a slave girl takes with his legitimate brothers a half share, and where there are no sons, (including son's sons and grandsons,) but only the son of a daughter, he is considered as a co-heir, and takes an equal share."

In his second vol. p. 15, he states—" According to Hindoo law the illegitimate son of a Soodra man by a female slave, or a female slave of his slave, may inherit, but not the illegitimate child of any of the three superior classes;" and he adds, " If the woman were not his female slave the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance," referring to *Colebrooke's Translation of the Mitacshara.* In ch. i. s. xii. of that work, on the right of a son by a female slave in the case of a Soodra's goods, even a son begotten by a Soodra on a female slave may take a share by the father's choice. But if the father be dead the brethren should make him partaker of a moiety of a share, and one who has no brothers may inherit the whole property in default of a daughter's son. In clause three it is stated " that the rule does not apply to the three superior regenerate classes." From the mention of a Soodra in this place, it follows that the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile he may receive a simple maintenance, 1 *Stra. H. L.* 70.

In another treatise on the Hindoo law of inheritance, also translated by *Colebrooke*, and which is the great authority in Bengal, *the Daya Bhaga of Jimuta Vahana*, p. 151, the same doctrine is to be found as well as in the treatise on Adoption. The *Dattaka Mimansa*, s. ii. cl. 26, p. 32, and the *Datt. Chand.* s. v. cl. 30, p. 205, translated by *Sutherland*, the third vol. of the *Digest*, p. 142; 1 *Stra. H. L.* 69, 132; 2 *ib.* 68. A decision on the right among Soodras of illegitimate children to inherit is reported in *Sir Thomas Strange's Notes of Cases* at Madras, *Vencataram* v. *Vencata Lutchemee Ummal*, vol. ii. p. 305. In his fragment he says, the illegitimate children of Soodras inherit; but in the case of illegitimate children begotten by a regenerate man the law is different—they are entitled to maintenance only.

" It seems, then, to be established by an unusual concurrence of

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authority that, according to the law prevalent where this property is situated, (in the district of Sarun, Bengal,) the illegitimate son of one of the three regenerate or twice-born races cannot succeed to the inheritance of his father."

MINOR.—If the heir be a minor, a guardian should be appointed for him, to whom the care of his property should be committed, until he is of age to take possession himself. See title Minority, *ante*, p. 63. Where sons or their issue are minors, full shares are reserved for them, under the charge of guardians, either specially appointed or assumed as such by the law. In general minority ceases on completion of the age of sixteen. In any of the three superior classes on his ending his studentship, and returning home from his preceptor, *Menu*, ch. viii. § 27; 1 *Dig.* 293; the *Ratnacara*, 3 *ib.* 543; 1 *Stra. H. L.* 133; 2 *ib.* 76, 77, see *ante*, p. 63. Zemindars are minors until eighteen, by *Madras Reg.* v. of 1804.

The natural guardians are the father, mother, elder brother, and paternal relatives. Any one of them, however, may be superseded by a decree of a Court, and incompetency in any one passes the right of guardianship on to the next. Although we have said a guardian should be appointed, yet it is not necessary that he should be specially appointed as such, for the person entitled to be a guardian will always be assumed in law to be such. See Minority, *ante*, p. 64.

With regard to the appointment of guardians, see *Mad. Reg.* v. of 1804, and Act ix. of 1861 of the Legislative Council of India.

It will have been seen from the foregoing, that property under the Hindoo law descends lineally, and vests in the legitimate male issue before the female. See *Malabar and Canara Law, post*, pp. 306, 309.

UNDIVIDED FAMILY.—According to the law of inheritance, all legitimate sons living in a state of union with their father at the time of his death succeed equally to his property.

PRIMOGENITURE.—The right of primogeniture was never a great favourite with the Hindoos; it, however, formerly prevailed to a certain extent. But with other usages it has been abolished. *Talevar Singh* v. *Pahlwan Singh*, 3 *S. D. A. Rep.* 203. Formerly the first born son was entitled, if he possessed extraordinary merit, bodily, mental, or moral, to the most valuable chattel, or the best room in the best house, 1 *Stra. H. L.* 184, 193. The eldest son is the managing member where there are sons by different wives, and one party claimed that the estate should be distributed according to the number of wives, without reference to the number of sons born by each, a distribution technically called *putnibhaga*, averring that such had been the kulachar or immemorial usage of the family; but the Court determined that the distribution amongst them should be made not with reference to the mothers, but with reference to the number of sons; being of opinion that although in cases of inheritance the kulachar or family usage has

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the presumptive force of law, yet to establish kulachar it is necessary that the usage should have been ancient and invariable, *Bhyroochund Rai* v. *Russoomuni*, 1 *ib.* 29; *Sheo Baksh Singh* v. *Tutteh Sing*, 2 *ib.* 265.

PUBLIC AND PRIVATE PROPERTY OF A RAJAH.—*Semble.* There is a distinction between the public and private property of a Hindoo sovereign, as upon his death his private property goes to one set of heirs, and the raj and the public property to the succeeding rajah. See *post*, p. 401.

The general rule of the Hindoo law of inheritance is partibility. The succession of a single heir, as in the case of a raj, is the exception, *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 7 *Moore's In. Ap.* 476.

EVIDENCE OF DESCENT OF ZEMINDAR'S ESTATE TO ELDEST SON.—In a suit by a younger brother against the eldest brother for partition of a zemindary estate, it was held that family usage and custom for eight generations for the zemindary estate to descend entire to the eldest son, to the exclusion of the others, was evidence that it was not *divisible* property, *Rawut Urjun Sing* v. *Rawut Ghunsiam Sing*, 5 *Moore's In. Ap.* 169. So family usage for fourteen generations, by which the succession of the raj zemindary of Tirhoot had uniformly descended entire to a single male heir, to the exclusion of the other members of the family, has been upheld, *Baboo Singh* v. *Maharaja Singh*, 6 *Moore's In. Ap.* 164.

The Judicial Committee, in delivering judgment in this case, said, "The principle upon which we are about to proceed in this case admits of no doubt or question whatever. By the general law prevaling in this district, and indeed generally under the Hindoo law, estates are divisible amongst the sons when there are more than one; they do not descend to the eldest, but are divisible amongst all. With respect to a raj, as a principality, the general rule is otherwise, and must be so. It is a sovereignty, a principality, a subordinate sovereignty and principality no doubt, but still a limited sovereignity and principality, which in its very nature excludes the idea of division in the sense in which that term is used in the present case." Again, there is no doubt that the general law with respect to inheritance as well as birth, in the case of great families where it is shown that usage has prevailed for a very long series of years, may be controlled unless there be positive law to the contrary. Failing all other claimants the property of the inferior classes vests by escheat in the king. The estates of Brahmins descend eventually to Brahmins, or learned priests, and not as an escheat to the king. This is a fixed law, says *Menu*, ch. ix. § 189, for the king to take it, except for protection and preservation for the rightful owner, would be sacrilege, equivalent to that of appropriating what has been consecrated to the gods, 3 *Dig.* 587. Rather than that it should so escheat, should there be none of the same class competent to take it,

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(meaning probably as before in the same town,) it is to be cast into the water, *Narada*, 1 *Dig.* 335, 336; 3 *ib.* 541; 1 *Stra. H. L.* 150. The last author adds, with characteristic simplicity, "a figurative declaration doubtless never intended to be literally and invariably enforced," but which really can mean nothing more than that it should be abandoned to the first comer, as must be evident, for no obligation to perform obsequies is imposed. See *post*, p. 302.

The *competency* to benefit the deceased in the solemnisation of exequial rites forms the consideration for the succession, whilst the *order* of succession is regulated by the *degree* of benefit conferred, *Jim. Vahana*, ch. xi. s. vi. § 29, 31. Benefits conferred by the nearest of kin are regarded of more importance than those offered by one more distantly allied, 3 *Dig.* 526, 455. See *ante*, p. 231.

SELF-ACQUIRED PROPERTY.—The self-acquired property of a co-parcener immoveable and moveable, vests wholly in his male issue as far as the great-grandson. Failing male issue, it goes to his united brothers and their line, *Stra. Man.* § 351.

In *Varadiperumal Udaiyan* v. *Ardanari Udaiyan*, 1 *Mad. H. C. R.* 412. *Mr Justice Holloway* says, I have always understood that in this Presidency, at least, the law was clearly that the immoveable property of an undivided member of a Hindoo family may go to his surviving co-parceners, whether such property was self-acquired or ancestral. During his life he is entitled to the separate enjoyment of his self-acquired immoveable property, with the right, if he have no male issue, to alienate the same. On his death, without male issue, if not previously alienated, it devolves on his co-parceners. But his widow, whether childless or not, has no title to anything but maintenance. The author of *Mitacshara* was clearly of *Daresvara's* opinion, *Mitac.* ch. ii. s. i. § 8. "The rule deduced from the texts that the wife shall take the estate, regards the widow of a separated brother." And it may reasonably be inferred that an author who lays down that a widow inherits when her husband was divided, was also of opinion that she would not inherit when the deceased was undivided.

In the *Sivagunga* case, it was ruled that even where the family was undivided, the widow inherited the self-acquired property of her husband in preference to his male kin, 9 *Moore's In. Ap.* 539.

On failure of male issue the succession is thus enumerated in the *Mitacshara*, ch. ii. s. i. § 2. The wife and the daughters also, both parents, brothers* likewise, and their sons.† Gentiles, cognates, a pupil, and fellow student. On failure of the first amongst these the next in order is indeed heir to one leaving no male issue. This rule extends to all classes and persons, *ib.* ch. ii. s. i. § 3. 1 *Morl. Dig.* 319; 1 *Moore's In. Ap.* 132.

This rule or order of succession extends to all tribes, whether the

* Balam Bhatta includes sisters.
† Balam Bhatta includes daughters of sons.

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Murdhavasikta and others in the direct series of the classes, or *Suta*, and the rest in the inverse order, and as comprehending the several classes, the sacerdotal and the rest, *Mitac*, ch. ii. s. i. § 4.

Section III.

INHERITANCE BY FEMALES.

Females inherit undivided families only—Their daughters' heirs differ according to marriage—Woman's fee—Widow—Self-acquired property—Childless widow—Right of widow with a power to adopt which has not been exercised by her—Similar to posthumous son—The widow of a son cannot claim through her husband if he has died during the life of his father—Whether the widow is entitled to inheritance or merely to maintenance—Several wives—Indivisible and self-acquired property—Grounds of the widow's right of succession—Widow's right to succeed to her husband's ancestral property—The widow's right of succession to self-acquired property of her husband, who was a member of an undivided family—If partition not complete residue left undivided—Two principles on which rule of succession depends—Self-acquired immoveable property—Nature of a widow's tenure—Life estate—Estate tail—Widow's right to accumulations of joint estate—Maintenance—Widow's power over her husband's property—Widow's right in undivided estate—Widow must be chaste—Consequences of infidelity—Abandonment of blameless wife—Wife's special property—Where wife dies without issue—The husband surviving—Son-in-law—Where widow leaves issue on re-marriage—Daughter's right after death of sonless widow—Their order of succession—In Bengal — Benares — Bombay — Mithila — Women's separate property — Self-acquired property — Applicable in every possible case — Self-acquired property—Daughter's son —Mithila school—Order of succession—Succession in descending lines stops with daughter's son — Daughter's grandson — Daughter's daughter—Grand-daughters—Where one of several daughters who succeeded as maiden dies, leaving sons and sisters —Where one of several daughters who had as married women succeeded dies, leaving sons, sisters, and sister's sons—A. B. and C. succeed—A. dies childless, B. has one son, C. has three sons, C. dies before A.—On failure of daughter's issue estate reverts to father's heirs.

Females inherit only in divided families, *Elberling* 68, or on exhaustion of male undivided members, *Stra. Man.* § 353 ; even in an undivided family a widow takes the self-acquired property left by her husband, *Shivagunga* case, 9 *Moore's In. Ap.* 539. No daughter can claim until after any surviving widow, 1 *Stra. H. L.* 138, *post*, pp. 248, 249.

Property vesting in a female descends first to her daughters, the unmarried having preference over the married, and the un-

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endowed over the endowed, then to her daughter's daughter, daughters' sons; sons; and sons' sons, *Stra. Man. H. L.* 354; 1 *Stra. H. L.* 51; *Mitac.* ch. ii. s. xi. § 9, 13; the distinction also prevailing in favour of those who have or may have sons, *Stra. M. ib.* citing *Smriti Chand.* See *post.*

That which a widow has derived from her husband on the exhaustion of the male line goes to his kindred in their order, *Stra. M. H. L.* 354.

Heirs differ according to form of marriage.—That which a woman may have received in gift from her own family returns to the donors, if alive, should her marriage have been of a disapproved species, namely, *Racshasa*, *Assoora*, or *Paishacha*. If the donors are dead it goes to her husband and his kindred, *Stra. M. H. L.* § 354.

If the marriage were of the disapproved sort, failing the son's son, the property would go to her mother, afterwards to her father, and after him to his heirs. Should the marriage have been of an approved species, namely, *Brahma*, *Daiva*, *Arsha*, *Prajapatya*, or *Gandharva*, the above gifts go to the husband and his kindred, 1 *Stra. H. L.* 51; *Mitac.* ch. ii. s. xi. § 2; *Smriti Chandrika; Stra. M.* § 354.

1 *Macnaghten*, *P. H. L.* 38, says stridhun, which has once devolved in succession, is ever after governed by the ordinary rules of inheritance. This is true to a certain extent if the stridhana devolves on a male. But if on a female it continues to be regarded as stridhun, according to the doctrine of the *Mitac.* to which *Macn.* refers in the passage from which the quotation is taken.

Woman's fee.—The woman's fee, or the gratuity given to her on her marriage by the bridegroom for purchase of household utensils, cattle, &c., (*Smriti Chand.* Mayookhum,) as an exception, goes to her brothers of the whole blood, 1 *Stra. H. L.* 51; *Stra. Man.* § 355.

Betrothed females.—Any nuptial presents a female may have received from her intended husband in anticipation of marriage, are returnable to him on her death unmarried, the charges on both sides being first deducted therefrom. The whole brothers shall have the ornaments for the head and other gifts presented to the maiden by her maternal grandfather, or her paternal uncle, or other relations, as well as the property which may have been regularly inherited by her. For *Baudhayana* says, the wealth of the deceased damsel let the uterine brethren themselves take. On failure of them, it shall belong to her mother, or if dead to her father, *Mitac.* ch. ii. s. xi. § 30.

Widow.—In default of sons, grandsons, and great-grandsons, the inheritance descends lineally no farther, and the widow succeeds, her place being assigned her in every enumeration of heirs next after sons, and before daughters. According to the Bengal law, whether her husband has separated, or was living as a member of an undivided family, she takes his property, *Jim. Vahana*, xi.

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s. i. § 46; 1 *Stra.* 121. But, according to the other schools, the widow succeeds to her husband's property only where he was separated from his brethren, an undivided brother being held to be the next heir, *ib.* 2 *Stra. H. L.* 233, *Coleb.* The widow, however, is in such case entitled to maintenance, *Mitac.* ch. ii. sec. i. § 20; *Stra.* 121, 134.

The author of the *Smriti Chandrika* cites *Brihaspati*, and *Prajapati* as his authorities for the doctrines laid down in ch. xi. respecting a widow's right of succession. *Brihaspati* ordains that the widow of a deceased man who left no male issue, takes his share notwithstanding kinsmen, a father, or uterine brother be present. *Prajapati*, referring to the widow, observes, § 4, "Having taken his moveable and immoveable property, the precious and the base metals, the grains, the liquids, and the clothes that are duly offered at his monthly and half-yearly repasts," § 20; see *Mayukha*, ch. iv. s. 8, § 2. *Brihaspati* again observes, "Whatever property a man possesses of any kind after division, whether mortgaged or otherwise, the wife shall take after the death of her husband, with the exception of fixed property, § 23. What the meaning of the exception "fixed property" is, does not clearly appear, but in accordance with the universally received opinion, the widow of a man dying without male issue, who is separate from his parceners, is entitled to succeed to all her husband's property. The author of the *Smriti Chandrika*, at § 24, observes, "The purport of the text is, whatever is the property of a deceased husband, whether consisting of moveables or immoveables, whether pledged or otherwise, the widow alone takes where the husband was divided member of the family." But somewhat inconsistently in the following paragraph, says, "in respect to the exception of fixed property." This exception is applicable to a *Patni*, who has not even a daughter, for if it were to be held applicable to any widow generally, the passage would be inconsistent with that of *Prajapati* already cited. No authority is quoted to justify the doctrine, that to entitle a widow to succeed to immoveable property she should have a daughter.

According to the doctrine of the *Smriti Chandrika*, ch. xi. p. 168, (translator's summary,) which is of great and paramount authority in Southern India, a widow being the mother of daughters, takes her husband's property, both moveable and immoveable where the family is divided.

A DAUGHTER.—The translator omits to notice the absence of authority in his summary. The *Mitac.* ch. ii. s. i. very clearly lays down the right to succeed in the widow as being irrespective of the necessity of having daughters; *Vrddhanlanee*, *Vrhad*, *Vishnu*, *Katyayana*, and *Vrihaspati*, are cited at § 6, in support of the author's views. These authorities place no such restriction on the widow's right of succession as the author of the *Smriti Chandrika* has done. According to the Bengal law, *Jimuta Vahana*, ch. xi. s. i. § 46, says, a widow succeeds whether her husband was divided from his co-proprietors or not.

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The *Vyavahara Mayukha*, ch. iv. s. viii. § 1, agrees with the *Mitac.*, and although he had the text of *Brihaspati* before him, which the author of the *Smriti Chandrika* construes to mean that a widow who succeeds to immoveable property should have a daughter, he does not draw this distinction. And it has been held at Bombay, that the widow of a Hindoo who died without male issue might give away her husband's property in *krshnarpana*, "grant of lands in propitiation of *krshna*," notwithstanding the existence of a sister's son, provided she herself have no son, or other near heir of her own, whose rights would be affected by such gift of their inheritance to another, *Kupoor Bhuwanee* v. *Sevukram Scoshunker*, 1 *Borr*, 405, 1 *Morl. Dig.* 265.

The widow of the deceased husband without male issue is sole heir to his moveable and immoveable property, as she takes before the daughters, 1 *Stra. H. L.* 133. *Keerut Sing* v. *Koolahul Sing*, 2 *Moore's In. Ap.* 331; *Coosseerauth Bysack* v. *Hurrosoondery Dossee*, *Morten's Decrees*, 85.

Self-acquired property.—By the law of inheritance, as prevailing in the southern parts of India, separate acquired estate descends to the widow in default of the male issue of the deceased husband, *Katama Natchiar* v. *Rajah of Shivagunga*, 9 *Moore*, v. 539.

When the estate is in the nature of a principality, impartible and capable of enjoyment by only one member of a family at a time, it descends to the widow in default of male issue, *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 *Moore's In. Ap.* 539.

A Hindoo widow, whether childless or not, stands next in the order of succession. Daughters can only succeed on failure of their mothers. If there are two wives, and one dies leaving a daughter, the daughter always inherits after the widow, and would get nothing till the death of the surviving widow, who would take all the property.

Where A. had two wives, B. and C.; and B. predeceased A., leaving three daughters; and C. survived A., and was childless. Held, that C. succeeded to A.'s property in preference to the three daughters, *Perammal* v. *Venkatammal*, 1 *Mad. H. C. R.* 223.

This was an appeal from the decision of the civil judge of Madura, affirming the decree of the acting subordinate judge of Madura. The plaintiff in the suit claimed certain moveable or immoveable property belonging to Venkatasvami, who had two wives, one of whom predeceased him, leaving three minor daughters. The other survived him, a childless widow, and was the first defendant in the suit. The question was, whether, under the circumstances, the minors were entitled to take or the widow? The subordinate judge decided in favour of the daughters, and the civil judge affirmed his decree upon the authority of *Macnaghten* and *Strange*, observing that the point is, whether the fact of the minor's mother having died prior to her husband, affects the minor's claim; but this the Court is of opinion it does not. Appellant, (first defendant,) as a childless widow cannot by Hindoo

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law inherit. She is only entitled to maintenance or a moiety of her husband's moveable property. Daughters do inherit and take by representation according to their mothers, *Stra. Man.* § 331.

From this decree the plaintiffs on behalf of the daughters appealed, and *Strange, J.*, in delivering his judgment said, We are unable to concur in the view taken by the lower courts of the Hindoo law of descent regulating the transmission of the property in dispute; we are not called upon to decide between the relative rights of the two wives, namely, the mother of the minors, in whose behalf the suit has been brought, and the first defendant, the one as having borne children; the other as childless; nor have we to say whether or not any such rights transmitted by their mother to the said minors would prevail against the first defendant. For the fact that the minor's mother died before her husband shows that the estate never vested in her, and consequently could not be transmitted through her. The minors have thus no rights derivable from their mother, whatever rights they possess must be traceable from their father. Now, it is indubitable that a widow, whether childless or not, stands next in the order of succession on failure of male issue, and that daughters can only succeed on failure of widows. The law being thus, the minor daughters can have no right to the estate during the lifetime of his widow, the first defendant.

The law is the same in Bengal. If a wife shall die in the lifetime of her husband, A., she, the deceased wife, having left a daughter B. If A., the father of B., shall then die, leaving a childless widow, C. and his daughter B. surviving him, C. shall first take the estate, and upon her death it shall go to B., *Macn. Cons. on H. L.* 9; *Ruvee Bhudr Sheo Bhudr* v. *Roops Shunker Shunkerjee*, 2 *Borr.* 656; 1 *Morl. Dig.* 313, § 57; *Vyavhara Mayukha*, ch. iv. s. viii. § 3, 10, 11, 12; *Mitacshara*, ch. ii. s. i. § 6; s. ii. § 1-4.

A Bengalee bequeathed all his property, moveable and immoveable, to his family idol, and directed that his property should never be divided by his (four) sons, &c., in succession, but that they should enjoy the surplus proceeds only, and in the event of disagreement between the sons and family, directed that after the expenses attending the estate, &c., and maintenance of the family, and whatever nett produce and surplus there might be, should be divided annually among the members of the family. At the date of the will the family were joint in estate, food, and ownership. The accumulations of the income were divided as directed. One of the sons of the testator died, leaving three sons, one of whom also died without issue, leaving a widow. Held, that the direction contained in the will that the property should go in the male line, did not exclude the widow of the grandson of the testator, and that the widow was entitled to a third share of a fourth part of the property, and accumulation without prejudice to her rights as a Hindoo widow when the property should be divided, *Sonatum Bysack* v. *Sreemutty Juggutsoonaree Dossee*, 8 *Moore's In. Ap.* 66.

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As to the capacity to inherit in Bombay, see *Laroo* v. *Sheo*, 1 *Borr.* 71; *Ichharam Shumbhoodas* v. *Prumanund Baeechund*, 2 *ib.* 471.

RIGHT OF WIDOW WITH A POWER TO ADOPT WHICH HAS NOT BEEN EXERCISED BY HER.—A childless Hindoo in Bengal authorised his widow to adopt a son at his decease, the widow did not exercise that power, and many years after her husband's death brought a suit as widow, claiming his succession in the family estates. Held, that the mere fact of there being authority given her by her husband to adopt a son did not before an adoption had actually taken place supersede and destroy her personal right as widow to sue, *Ramundoss Mookerjea* v. *Mt. Tarinee*, 7 *Moore's In. Ap.* 169.

In this case, it was contended by the defendant, that since in her plaint the plaintiff admits that she had the authority of her husband to adopt a son, her personal right as a widow must be taken upon her own statement to have lapsed, the right vesting from the date of her husband's death in the boy thereafter to be adopted by her according to the principles of Hindoo law, citing in support of this doctrine the case of *Beejayah Dibbeah* v. *Shama Soondree Dibbeah*, *S. D. A.* 1848, p. 762, which was decided after the present case was brought before the Sudder Ameen, who admitted the plaintiff's right to sue on the authority of an unreported case in the *S. D. A.* of *Bhoobuniswaree Dibbeah* v. *Kubmunnee*, 10th April 1821.

The Appellate Court, in the present case, came to the conclusion, differing from the decision in *Beejayah's* case, and held that the fact of an authority to adopt a son being possessed by the widow, does not supersede or destroy her personal rights as widow, and that those rights continuing in force till an adoption is absolutely made, there is no bar to the plaintiff's claim as widow. The Court proceeded to show, that no reliance could be placed upon the opinion of the pundit in the case under appeal, for the cited case of *Ranee Kishonmunee* v. *Rajah Oodwunt Singh*, 3 *S. D. A.* 228, in which the pundit held, that the moment permission to a widow to adopt a son was pronounced, it had the same effect as if a child had been conceived in the womb of the widow, and her intention to adopt under the permission operated, to all intents and purposes, as if she were *enciente*, and that a boy subsequently adopted by her had all the rights of a posthumous child. It is manifest that although the pundit stated, in his opinion, the suit for a personal right as widow could not lie under such circumstances, he has, when citing authorities, assumed the main point at issue, and has quoted only texts which are quite valueless as to the doubts proposed to himself. The case of *Ranee Kishonmunee* v. *Rajah Oodwunt Singh*, turned on another point—viz., whether a retrospective right could be claimed by a son after he had been adopted, so as to bar a sale made by his adoptive mother, previous to his adoption, to the injury of his rights, at that time contingent and eventual, but which actually accrued to him on his adoption. In that case, the son, when adopted, became the undoubted heir, and it was of course the correct doctrine, that no sale made by a widow who possesses

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only a very restricted life interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity. The case therefore refers only to the rights claimable by an adopted son after adoption made.

There is no doubt as to the declared right of a widow in Bengal to succeed to her husband's estate upon his death, in default of lineal male heirs, down to the great-grandson in the male line. If no text can be shown for the suspension of the rights of a widow actually pregnant, it is still more certain that there is no similar provision for the divestiture of right in the case of a widow held only to be constructively pregnant of a son, through the effect of permission to adopt.

The single passage of the Hindoo law on which the objection to the widow's right, either in the case of a real or constructive pregnancy is directly rested is the following,— which is noted in the two cases of *Ranee Kishonmunee* v. *Rajah Oodwunt Singh*, *supra;* and *Ramkishen Surkhyl* v. *Mus. Sri Mutee Dibia*, 3 *S. D. A.* 367, and of which the translation from *Colebrooke's* translation of the *Daya Bhaga*, ch. i. s. 45, is subjoined—viz., "They who are born, and they who are yet unbegotten, and who are actually in the womb, all require the means of support, and the dissipation of their hereditary maintenance is censured." It has been contended, that this prescribes a moral rather than a legal obligation, and would militate against the admitted right of a Bengalee Hindoo father to dispose of his property according to his own choice by will. But the text refers to a contingent and future, not to a present right. Consistently with this, we find that the right accruing to an after-born son in regard to real ancestral property, is thus described in the same *Treatise*, ch. vii. § 11, 12. That is declared by *Vishnu*—" Sons with whom the father has made a partition should give a share to the son born after the distribution." So *Yajnavalchya*, " When the sons have been separate, one afterwards born of a woman equal in class, shares the distribution ; his allotment must positively be made out of the visible estate, corrected for income and expenditure ;" to which is appended the following note by the commentators, *Srikrishna*, &c., as to the words, "must positively ;" the particle "va" is affirmative, and what has been consumed is consequently excepted. See also the *Daya Krama Sangraha*, as to the right accruing to sons after-born, ch. v. s. 21–24, so that the after-born son's right is to his share of the estate as it stands at the time of his birth, and not retrospectively, with reference to its state at any supposed period of his conception.

A strong illustration is drawn from the law of partition, according to the *Mitacshara*, ch. i. s. vi. § 11, 12, that if the pregnancy of a brother's widow be manifest at the time of partition, it should be postponed until after the delivery. Some commentators, as will be seen by the note, hold the sense of the passage to be, that

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partition may at once take place; but that a share shall be set apart for the widow, who is supposed to be pregnant; and when she is delivered, the share is to be assigned to the son; but this interpretation is rejected by others, chiefly because, according to the law of the Western schools in regard to an estate still undivided, widows are not entitled to participate as heirs.

The clear inference is, that could a widow have been heir, as she incontestably can in Bengal, she might have been admitted in her own right during pregnancy, the share devolving upon the son only on his birth.

As to the law of Bengal, it need only be added, that the commentator *Srikrishna*, when expounding *Jim. Vahana*, ch. i. § 43, the peculiar doctrine of the Bengal school, as to a right of inheritance not vesting in the son till after the death of the father, says of a passage of *Guatama*, cited in the *Mitacshara*, on birth being the means or cause of the acquisition of property, that the text is unauthorised, or if it be authorised, it relates to the case of one whose father dies while the child is in the mother's womb.

Here is an express and conclusive reference to actual birth after the death of the father, as to the pèriod of the commencement of the right.

Of authorities other than the text of law and commentaries the following may be quoted:—1 *Sir W. Macn. Prins. of H. L.* p. 2, says, "The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant, (whether effected by death or otherwise,) conjointly create this right—the inchoate right which previously existed becoming perfected by the removal of the obstacle." 2 *Stra. H. L.* 127, *Colebrooke*, "Presuming the property here spoken of as the woman's to have been what devolved upon her by the death of her husband, and not to have been her proper *stridhana*, it ceased to be hers at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property coming into the hands of a pregnant widow by the same means cannot be used by her as her own after the birth of a son."

An adopted child is in most respects precisely similar to a posthumous son.—From the moment of the adoption taking effect, the child became heir of the widow's husband, and the widow could have no other authority but that of mother and guardian. The only means of evading the application of this opinion, so weighty and so direct to the point, has been by arguing that it was given in regard to a Madras case, and had referred to the law of the *Mitacshara*.

But, first, no distinction between the two schools, as to the point in question, is in any way alluded to in the opinion; and next, the case itself was one of succession of a widow to the separate property of her husband, in which case a widow has the same right under the *Mitacshara* as she has in all cases under the Bengal law.

There is a difference between the two schools as to the period at

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which after birth the rights of sons over the property of the father commence. The *Mitacshara* holding the commencement immediate, and the rights of the sons to be concurrent with those of the father, (as with us in the familiar case of an entail;) the Bengal school holding the rights of the sons to commence only on the death of the father. But there is nothing in that difference which affects the applicability of *Colebrooke's* opinion to the case of sons in Bengal as well as elsewhere, antecedent to birth. See the *dictum* of the Privy Council in *Dhurm Das Pandy* v. *Mt. Shama Soondri Dibiah*; 3 *Moore's In. Ap.* 243.

Now, upon the authorities, there can be no doubt that that is the result of an act of adoption, because the property is in the widow from the death of the husband till the power of adoption is exercised. Then that adoption divests it from the widow, and vests it in the adopted son. Authorities are not quoted for this opinion, nor does the point appear to have been discussed in this case. But the passage shows the sense of the highest judicial authority as to the admitted doctrine on the subject.

It is true that it is a mere dictum of the Privy Council, the point not having been discussed in the case, and no authorities having been cited. Nevertheless it shows the opinion of judges who are familiar with the principles of Indian law.

An anonymous case, 2 *Morl. Dig.* 18; *Mussumaut Bhuwani Munee* v. *Mussumaut Solukhna*, 1 *S. D. A.* 322, (1811;) *Kuruna Mai* v. *Jai Chandra Ghos*, 5 *S. D. A.* 42, (1830;) *Kishen Lochan Bose* v. *Tarini Dasi*, *ib.* 55, (1830;) *Lakhi Priya* v. *Bhairab Chandra Chaudhari*, *ib.* 315, (1833;) *Mussumaut Himulta Chowdrayn* v. *Mussumaut Pudoo Manee Chowdrayn*, 4 *S. D. A.* 19; *Mussumaut Subadra Chowdryn* v. *Goluknath Chowdry*, 7 *S. D. A.* 143, were commented upon and distinguished.

Other points of speculative doubt and nicety were referred to in the argument, but were not discussed in the judgment—viz., as to the possibility of right present and contingent in a child from the moment of its conception in the womb; as to what is the precise time of vital conception and existence, according to Hindoo law and custom; as to the analogies between the condition of a widow who has received permission from her husband to adopt, and of a widow naturally pregnant; as to the abstract causes or grounds of inheritance. See 7 *Moore's In. Ap.* 180.

THE WIDOW OF A SON CANNOT CLAIM THROUGH HER HUSBAND IF HE HAS DIED DURING THE LIFETIME OF HIS FATHER.—A son married and died in the lifetime of his father, the father previously to his death disposed of his property for the support of his daughter, a sister, and the son's widow. The widow of the son claimed it as hers. *Mr Colebrooke* was of opinion that, according to the *Mitacshara*, the daughter would have inherited in preference to the son's widow, though the author of the *Vaijayante*, and a few other writers, hold differently, 2 *Stra. H. L.* 234, *C.*

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A widow whose husband died in the lifetime of his father has no right to claim a share of her father-in-law's estate, nor does there exist any supposed case in which she could inherit or participate in it. To make such relation an equal participator with the wife is very erroneous, 2 *Stra. H. L.* 235, *Sutherland.*

WHETHER THE WIDOW IS ENTITLED TO INHERITANCE, OR MERELY TO MAINTENANCE.—According to the Benares and Southern India school, when the family is undivided, the widow is only entitled to maintenance, *Mitac.* ch. ii. s. 1, § 20, 30; 1 *Stra. H. L.* 121, 171.

Sir Thos. Strange, p. 45, says, When the husband died before consummation, it has been held that his widow is entitled to maintenance only. But *Mr Strange*, in his *Manual* says, that it gives her a right of inheritance. *Sir Thos. Strange* cites the case of *Vencataratnam* v. *Vencammal*, *S. C. Mad.* 1824, for his proposition. But the case can hardly be considered law. *Mr Strange's* opinion is certainly more conformable to equity, for it is but fair if she is to suffer all the disabilities of widowhood she should also enjoy the advantages. Consummation, according to Hindoo law, is a non-essential of marriage, and therefore, whether consummation has taken place or not, her rights should not be affected in the one case any more than in the other, *ante*, p. 7.

SEVERAL WIVES.—It has been held that where there is a plurality of wives, and no sons by any, the one first married being the one who is to be considered as having been married, from a sense of duty succeeds, to the exclusion of the others, each of whom takes after her in succession in her order of marriage, 1 *Stra. H. L.* 56, 136, 137; 3 *Dig.* 461, 489; *Stra. Man.* § 326.

Mr Justice Arnould, in the case of the goods of *Dadoo Mania*, *Ind. Jur.* 25th Oct. 1862, p. 59, said, In Bengal the two wives take the whole estate for life, and on the death of one the whole survives to the other, upon whose death it goes to the collateral heirs of the husband, 1 *Morl. Dig.* 313, § 62. In Madras it has been held that the eldest widow succeeds, the other widows being entitled during her life to maintenance only, the second widow succeeding on the death of the first, 1 *Mad. Sel. Dec.* 456, 457, and *R. A.* No. 1 of 1835; 2 *ib.* 44. But see *Strange's Man. H. L.* § 326, where the author lays it down that in Southern India the wives are viewed as on an equality, and inherit equally, and considers the following passage from the *Mitacshara*, ch. ii. s. i. § 5, (omitted in *Colebrooke's Translation*,) which the editor owes to *Vakil Crinivasacharya*. "The singular number," "wife," signifies the kind; hence if there are two widows, one the mother of daughters, the other childless, the former alone takes the immoveable estate, and the moveable property is equally divided amongst them.*

When there are several widows, those with issue, daughters, take the immoveable estate in equal proportions, to the exclusion

* "Several wives belonging to the same or different castes, (they) divide the property according to the shares prescribed to them and take it."

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of those without issue. The personal property all share alike, *Saraswatee Velasa, Stra. Man.* 327.

We are not aware of any decision on the subject, and doubt much whether *Mr J. Strange's* view would be upheld if the subject were mooted. See *ante*, p. 255.

INDIVISIBLE AND SELF-ACQUIRED PROPERTY.—Of course the senior widow takes property which is in its nature indivisible, as a zemindari, &c. It was formerly held that the widow took property only when her husband was a divided holder; but, in the *Shivagunga case*, 9 *Moore's In. Ap.* 539, it was ruled that, even when the family was undivided, the widow inherited the self-acquired property of her husband, in preference to his male kin. In this case the property of the zemindar had been confiscated for disloyalty by the then zemindar. It was then conferred upon a younger brother, and was consequently held to be self-acquired, and another undivided elder brother could not take in preference to the widow of the second zemindar.

Where there are two united brothers who die in succession without male issue, each leaving a widow, the widow of the last survivor alone inherits; because the property, on the death of the brother who deceased first, went by survivorship to the other, and from him passed to his widow, 2 *Stra. H. L. C.* and *Dorin.* 231, 232; *Stra. Mans.* 349.

Where one of two united brothers dies, leaving a daughter, she does not succeed—the property passes to the surviving brother and his line.

GROUNDS OF THE WIDOW'S RIGHT OF SUCCESSION.—The ground upon which the widow's right of succession is based is the assistance rendered by her to her husband in the performance of his religious duties, 3 *Dig.* 456; 1 *Stra. H. L.* 134. But if the doctrine of *Sir Thos. Strange, supra*—viz., that it is "a right vested in her by marriage, to be perfected on the death of her husband without leaving male issue," be correct, the performance of religious duties is not a very satisfactory reason for the rule.

Sir Colley Scotland, in delivering judgment in the case of *Viras Vami Gramini* v. *Ayyasvami Gramini*, 1 *Mad. H. C. R.* 475, says—"It seems to us that the real ground upon which the widow's right of succession is placed in the *Daya Bhaga* is the authority of *Vrihaspati*, who says, that "A wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased, half the body survives;" adding, by way of question, "How then should another take his property while half his person is alive?" So that the right, in truth, rests upon the oneness of husband and wife, and not upon the existence of a separate estate and interest of the husband in the property during his life. Such a separate estate, as a matter of inference, might be deduced as well from the descent of the father's undivided share to sons, which is common to both schools of law, as from its descent to his widow, which is peculiar to the Bengal school."

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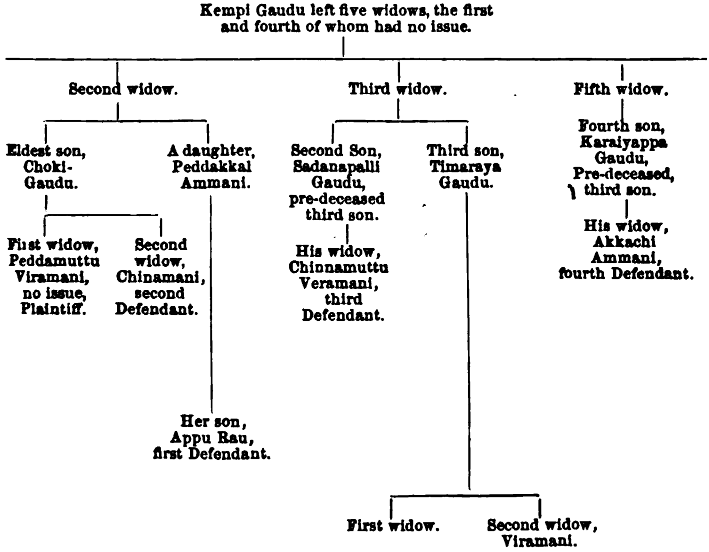
Widow's right to succeed to her husband's ancestral property.—A widow's right to succeed to her husband's ancestral property is only as his immediate heir.

A widow can only inherit family property where there has been a partition among the co-parceners, of whom her husband was one; or where the whole property has vested in her husband by the death of all the other co-parceners.

The widow of an undivided Hindoo, who leaves a co-parcener him surviving, has like the widow of a divided Hindoo, who leaves male issue, merely a right to maintenance.

Where, therefore, a widow sued for a Palaiyappattu, as heir to the surviving brother of her husband, it was held that the suit must be dismissed, *Peddamuttu Viramani* v. *Appu Rau*, 2 *Mad. H. C. R.*, 117. This was an appeal from the decree of the civil judge of Salem, in a suit brought to recover the Palaiyappattu of *Ankusagiri*; and the position of the parties will be more easily understood by the following table of pedigree.



The plaintiff claimed by right of succession as widow to recover the Palaiyappattu, and other moveable property belonging thereto, and which was in the possession of the first defendant, Appu Rau.

The civil judge held that as the plaintiff had failed to prove an *istimrar sanad,* (deed of permanent settlement,) the proprietary right could not be considered as having passed from the Government, and that the court had not jurisdiction to investigate the right

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of the Government to make the grant to the first defendant, and dismissed the suit. And the plaintiff appealed upon the ground that, whether taking the case to be as presented by the plaintiff, she was entitled as heir to succeed on the death of the person last in possession; and the Court in delivering judgment, assumed that the Palaiyappattu was, as the plaintiff alleges, the ancestral hereditary property of the family of her husband, and the said Palaiyappattu, it appears, was in the possession and enjoyment of Karaiyappa Gaudu when the country first came under British rule; and after his death it passed to his grandson, Kempi Gaudu, who was succeeded in his possession by his eldest son, Choki Gaudu, the husband of the plaintiff and of the second defendant. Kempi Gaudu had five wives, three sons besides Choki, and two daughters. The third and fourth defendants were the widows of his second and fourth sons, and the first defendant is the son of his daughter by his first wife. Upon the death of Choki the Palaiyappattu passed to Timaraya Gaudu, the third son of Kempi Gaudu by his third wife, his second son being dead, and his fourth son died before Timaraya Gaudu. None of his sons had male issue, but Choki Gaudu, and the second and fourth sons left daughters who had married and removed from the family. Timaraya Gaudu had two wives who survived him; and upon his death, there being no male heir, the Palaiyappattu passed to his senior widow, and at her death to his other widow, Viramani. Upon her death, the Palaiyappattu was *zufted* by the collector, who held it until the first defendant was put into possession under an order of Government granting the property to him.

Upon these facts, and treating the Palaiyappattu as ancestral property, there can be no doubt, the family being undivided, that Timaraya was the rightful heir entitled to succeed on the death of his brother, the plaintiff's husband, and that the proprietary right became vested in him solely, and passed to his two widows successively for life as his immediate heirs. This being so, the person to succeed upon the death of Viramani was the next heir in the family of Timaraya, and unless the plaintiff stands in that situation, she altogether fails in the suit. The appellant contended that the right of females in an undivided family to inherit in default of male members was not confined to those who were strictly in the line of heirs of the person last seised of the property; and the plaintiff, as senior widow of Choki Gaudu was, in the absence of any issue of Timaraya, the nearest female member of the family, and as such entitled to succeed, the first defendant, a sister's son not being in the line of heirs.

We think the Hindoo law of succession affords no ground for this contention. . . . The authoritative text of the *Mitacshara*, ch. ii. s. i. § 39, "that a wife takes the whole estate of a man, who being separated from his co-heirs, and not subsequently re-

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united with them, dies, leaving no male issue," recognises the widow's right to succeed only as immediate heir of her husband, and is opposed to any right in the widow to inherit undivided family property. By the recent judgment of the Privy Council, in the case of *Katama Natchiar* v. *the Rajah of Shivagunga*, 9 *Moore's P. C.* 529, it has been decided that this text does not apply to the self-acquired property of a co-parcener. But as regards property held in co-parcenery there can, we think, be no doubt that the law which governs here is in accordance with the rule of succession there laid down, unless there has been a partition between the co-parceners, or the entire family property has by the death of all the co-parceners vested in one survivor, who leaves a widow, the right to inherit as widow does not arise. If upon the death of the husband the family property passes to a co-parcener by right of succession, (as we take it, the Palaiyappattu passed in this case,) the widow possesses no more than a right to maintenance, just as in the case where the husband dies, separated in estate from his family, and leaving male issue, who inherit his property. We may refer here to the opinions recorded, 2 *Stra. H. L.* 231, 233, and to a case, No. 12 of 1818, reported in No. 1 *Mad. Sadr. Decrees*, 210.

There is no principle of Hindoo law of succession, that we are aware of, upon which the plaintiff can rest her claim to succeed by right of inheritance from Timaraya, in whom, as sole survivor, the entire proprietary right became vested.

The principle upon which the relationship of wife secures the right of inheritance, whether that principle be the widow's competency to perform her husband's funeral obsequies, or, as put by *Vrihaspati*, that half the body of the husband survives in the widow, (see the *Shivagunga case*, above referred to, and *Virasvani Gramani* v. *Ayyesvami Gramami*, 1 *Mad. H. C. R.* 475,) it is obvious, affords no foundation for the plaintiff's claim to succeed as heir to the surviving brother of her husband.

There appears to us no legal ground for saying that, as widow, the plaintiff is in any better situation now to claim the right to inherit than she was at the death of Timaraya, or that more remains to her than the right of maintenance which she hitherto possessed, see *Katama Natchiar* v. *Rajah of Shivagunga*, *infra*.

WIDOW'S RIGHT OF SUCCESSION TO SELF-ACQUIRED PROPERTY OF HER HUSBAND, WHO WAS A MEMBER OF AN UNITED FAMILY.—In an united Hindoo family, where there is ancestral family property, and one of the members of the family acquires separate estate, on the death of that member such separate acquired estate does not fall into the common stock, but descends in the same manner as if the deceased had divided from his co-sharers, *i.e.* to the male issue, if any, of the acquirer, or in default to his daughters, who, while separated, they take their father's share in the ancestral property, subject to all the rights of co-parceners, inherit the self-ac-

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quired estate free from such rights. Where property belonging in common to an united Hindoo family has been divided, the share of a deceased member of the family goes in the general course of descent of separate acquired property:* but if there is a co-parcenership between the different members of the united family survivorship follows. Upon the principle of survivorship the right of co-parceners in the undivided estate overrides the widow's right of succession; but with respect to self-acquired property of a member of an united family, the other members of the family have neither community of interest, nor unity of possession; therefore, the foundation of the right to take by survivorship fails, *Katama Natchiar* v. *Rajah of Shivagunga*, 9 *Moore's In. Ap.* 539.

The zemindary in this case is in the nature of a principality—impartible, and capable of enjoyment by only one member of the family at a time. The rule of succession to it is that of the general Hindoo law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject.

Hence if the zemindar, at the time of his death, and his nephews, (brother's sons,) were members of an undivided Hindoo family, and the zemindari, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the zemindar at the time of his death was separate in estate from his brother's family, the zemindari ought to have passed to one of his widows, and failing his widows, to a daughter, or descendant of a daughter preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestable, but the widows and daughters say that even if the late zemindar continued to be generally undivided in estate with his brother's family, this zemindari was his self-acquired and separate property, and as such was descendible like separate estate to his widows and daughters, and their issue, in preference to his nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property.

The questions raised in the case were, Was the uncle of the respondent and his brother, the father of the respondent, undivided in estate, or had a partition taken place between them?

Secondly, If they were undivided, was the zemindari the self-acquired and separate property of the uncle? and if so,

Thirdly, What is the course of succession, according to the Hindoo law of the South of India, of such an acquisition where the family is in other respects an undivided family?

Upon the first point the civil judge held that the brothers were undivided, and their Lordships did not disturb that finding.

* This is not strictly correct—in most cases it would be ancestral property.

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The second question was answered in the affirmative by the Judicial Committee.

The third is one of nicety, and of some difficulty.

The conclusion which the Courts of India have arrived at upon it, is founded upon the opinion of the pundits, and upon authorities referred to by them. Before examining these opinions and authorities, it will be well to consider more fully the law of inheritance as it prevails at Madras and throughout the southern parts of India, and the principles upon which it rests, and by which it is governed. The law is to be found in the *Mitacshara*, and in ch. ii. s. i. of that work the right of widows to inherit in default of male issue is fully considered and discussed.

The *Mitacshara* purports to be a commentary upon the earlier institutes of *Yajnavalchya*, and the section in question begins by reciting a text from that work, which affirms in general terms the right of the widow to inherit on failure of male issue. But then the author of the *Mitacshara* refers to various authorities, which are apparently in conflict with the doctrines of *Yajnavalchya*, and after reviewing these authorities seeks to reconcile them by coming to the conclusion "that a wedded wife, being chaste, takes the whole estate of a man, who being separated from his co-heirs, and not subsequently re-united with them dies, leaving no male issue." This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed that the text is propounded as a qualification of the larger and more general proposition in favour of widows, and consequently, that in construing it we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and indeed the whole chapter in which the text is contained seems to deal only with cases in which the property in question has been either wholly the common property of an united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of an united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that because widows take the whole estate of their husbands when they have been separated from, and not re-united with, their co-heirs, and have died leaving no male issue, they cannot when their husbands have been so separated take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us we must look to the principles of the law to guide us in determin-

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ing it. It is to be observed, in the first place, that the general course of descent of separate property, according to Hindoo law, is not disputed. It is admitted, that according to that law, such property descends to the widow in default of male issue. It is upon the respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according to the general course of law. This is attempted to be done by showing a general state of co-parcenership as to the family property; but assuming this to have been proved, or to be presumable, from there being no disproof of the normal state of co-parcenership, this proof, or absence of proof, cannot alter the case, unless it be also the law that there cannot be property belonging to a member of an united Hindoo family, which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported by authority, and at variance with principle.

IF PARTITION NOT COMPLETE RESIDUE LEFT UNDIVIDED.—That two courses of descent may obtain on a part division of joint property is apparent from a passage in 1 *Macn. Prins. H. L.* p. 53, title "Partition," where it is said, "According to the more correct opinion, where there is an undivided residue it is not subject to the ordinary rules of partition of joint property; in other words, if, at a general partition any of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."

"Again, it is not pretended that on the death of the acquirer, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted, that if the acquirer leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, when there is male issue, the family property and the separate property would not descend to different persons, they would descend in a different way, and with different consequences, the sons taking their father's share in the ancestral property, subject to all the rights of co-parceners in that property, and his self-acquired property, free from these rights. The course of succession would not be the same for the family and the separate property, and it is clear, therefore, that according to Hindoo law there need not be unity of heirship.

"But to look more closely into the Hindoo law. When property, belonging in common to an united Hindoo family, has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the same rule apply to property which from its first acquisition has always been separate? We have seen from *Macn. H. L.* that where a residue is left undivided upon partition, what is divided goes as separate property, what is undivided follows the family

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property; that which remains as it was devolves in the old line; that which is changed, and becomes separate, devolves in the new line. In other words, the law of succession follows the nature of the property, and of the interest in it."

TWO PRINCIPLES ON WHICH RULE OF SUCCESSION DEPENDS.—"Again, there are two principles upon which the rule of succession, according to Hindoo law, appears to depend. The first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased. The other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands dying separated from their kindred on the first of these principles, (1 *Stra. H. L.* 135,) but some ancient authorities also invoke the other principle. *Vrihaspati*, (3 *Dig.* 458, tit. cccxcix.; see also *Sir W. Jones's Paper*, 2 *Stra. H. L.* 250,) says, 'Of him whose wife is not deceased half the body survives, how should another take the property while half the body of the owner lives?' Now, if the first of these principles were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate. For, it is upon this principle that she is preferred to his divided brothers in the succession to a separate estate. But it is perfectly intelligible that upon the principle of survivorship the right of the co-parceners in an undivided estate should override the widow's right of succession, whether based upon the spiritual doctrine, or upon the doctrine of survivorship. It is, therefore, on the principle of survivorship that the qualification of the widow's right, established by the *Mitacshara*, whatever be its extent, must be taken to depend."

"If this be so we can hardly, in a doubtful case, and in the absence of positive authority, extend the rule beyond the reasons for it. According to the principles of Hindoo law there is co-parcenership between all the different members of an united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had, during the deceased's lifetime a common interest, and a common possession. But the law of partition shows, that as to the separately acquired property of one member of an united family the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails, and there are no grounds for postponing the widow's right to any superior right of the co-parceners in the undivided property."

"Again, the theory which would restrict the preference of the co-parceners over the widow's to partible property is not only, as

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is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as observed by *Sir Thomas Strange*, are so intimately connected that they may almost be said to be blended together; and it is surely not consistent with this position that co-parceners should take separate property by descent, when they take no interest in it upon partition. The view which we have thus indicated of Hindoo law is not only, as we have shown, most consistent with its principles, but it is also most consistent with convenience."

"A case may be put of a Hindoo being a member of an united family, having common property, and being himself possessed also of separate property, he may be desirous to provide for his widow and daughters by means of the separate property, and yet wish to keep this family estate undivided. But if the rule contended for were to prevail, he could not effect his first object without insisting on the partition which, *ex hypothesi*, he is anxious to avoid."

"On examining the reasons on which the pundits rest their opinions, they proceed upon the assumption that the texts cited by them apply to the case which they were called upon to consider. They seem to have done so, both as to the passages cited from *Vrihaspati* and as to the text in the *Mitacshara*, to which they refer. But they leave untouched the question which they ought to have considered, whether these authorities do or do not affect this particular case? What we have already said as to the texts from the *Mitacshara*, and what we shall presently say as to the passages from *Vrihaspati*, we think a sufficient answer to this part of the reasons on which the pundits found their opinion. Then, again, they point to the distinction between obstructed and non-obstructed heritage, and because the widow's right is not mentioned as obstructing the heritage, they infer that she cannot be entitled."

"But the whole of this last argument seems to be founded on the passages in the *Mitacshara*, contained in clauses 2 and 3 of s. i. ch. i., and these passages, when examined, clearly appear to be mere definitions of obstructed and non-obstructed heritage, and to have no bearing upon the relative rights of those who take in default of male issue. If the pundits' argument upon these passages be well founded, it would, as it seems, prevent the widow from taking in any case."

They rely upon the text in *Mitacshara*, already referred to, and upon the passages from *Vrihaspati* and several other commentators. We have already stated that the text from the *Mitacshara* does not apply to this case, and the passages from the commentators are all of equivocal import. They may or may not be intended to apply to a case like the present. . . . But they seem to be passages similar to those which were brought forward before the time of the *Mitacshara*, to show that widows were not entitled even where the property was wholly separate. We may instance the passage from *Narada*. These authorities failed, when contrasted

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with conflicting passages in the works of other commentators, of which the pundits in this case have taken no notice, to negative the right of the widow, where the property was wholly separate. It seems to us also that the decision in the *Sandyer* case, 9 *Moore's In. Ap.* 576, a decision also founded on the opinion of the pundits of the Sudr. Court, is wholly at variance with the opinion of the pundits in the present case; whether the pundits in that case were or were not right, in the opinion that the zemindary became the separate property of the uncle, by the transaction between him and his nephew, it is quite unnecessary to consider. All that is important to be considered is, that holding the zemindary to have become the separate property of the uncle, they held that the widows of the uncle's son became entitled to it, and that the Court followed that opinion.

The case stands thus upon the authorities :—On the one hand, we have the opinion of the pundits, which seems never to have been acted upon by any final decree. On the other hand, we have the decision in the *Sandyer* case, and the authorities cited by the appellant at the bar, particularly the passage from *Menu*, in *Sir W. Jones's* paper in 2 *Stra. H. L.* 250, and the opinion, *ib.* 231, the latter and material portion of which is not open to the objection taken to the passage which precedes it by *Mr Colebrooke* and *Dorin.*

The lords of the Judicial Committee decided in favour of the appellant.

SELF-ACQUIRED IMMOVEABLE PROPERTY.—An undivided Hindoo is entitled during his life to the separate enjoyment of his self-acquired immoveable property; but such property will, in the event of his death without male issue, and previous disposition thereof, devolve on his surviving co-parceners, and his widow is entitled only to maintenance, *Varadiperumal Udaiyan* v. *Ardanari Udaiyan*, 1 *Mad. H. C. R.* 412.

This suit was brought to recover certain lands. The first defendant was a Hindoo widow, and the plaintiff sued as undivided cousin of her deceased husband. The property was the self-acquisition of the deceased, who died undivided, without male issue; and the question raised was, Whether this property went, on his death, to his widow; or to his surviving co-parceners? The principal Sudr. Ameen held, on the authority of *Mr Strange's Manual*, § 319, that the plaintiffs, as the surviving co-parceners of the deceased, must be regarded as his rightful heirs, in whatever way the property left by him was acquired. This decision was appealed against, and the acting civil judge dismissed the appeal; and this decision was brought by appeal before the High Court. *A vyavastha* of the pundits, and the authorities of *Yajnavalchya*, bk. ii. cl. 118, 119; *Menu*, ch. ix. § 208; *Vyasa, Katyayana*; 1 *Stra. H. L.* 121; *Stra. M. H. L.* § 377, were cited and relied on; but the appeal was dismissed.

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Mr Justice Holloway, in delivering judgment, said :—

"I have always understood that, in this Presidency at least, the law was clearly that the immoveable property of an undivided member of a Hindoo family may go to his surviving co-parceners, whether such property were self-acquired or ancestral. During his life he is entitled to the separate enjoyment of his self-acquired immoveable property; with the right, if he have no male issue, to alienate the same. On his death without male issue, such property, if not previously alienated, devolves on his co-parceners. But his widow, whether childless or not, has no title to anything but maintenance." The *Mitacshara* has, no doubt, like all Hindoo law books, the advantage of containing statements of the most discordant character; but it is clear that its author was of *Dhaveswara's* opinion, (*Mitac.* ch. ii. s. i. § 8 :) "The rule deduced from the texts, that the wife shall take the estate, regards the widow of a separated brother; and it may reasonably be inferred, that an author who lays down that a widow inherits when her husband was divided, was also of opinion that she would not inherit when the deceased was undivided."

The learned editor has appended the following as a note to this case: "But see *Menu*, cited 2 *Stra. H. L.* 250, from a copy of a paper in the handwriting of *Sir W. Jones:* If the husband has been a co-heir, and died before partition, his brothers, and the next order inherit his undivided share, but his wife takes all his divided property, and the opinion of a Mofussil pundit cited, 2 *ib.* 231. The judgment of the lords of the Judicial Committee of the Privy Council in *Katama Natchiar* v. *Rajah of Shivagunga*, (30th May 1863,) principally rests on the passage last cited, which the reporter has been unable to find in *Menu*, or elsewhere."

This would seem to be a misconception of the learned editor. The lords of the Privy Council appear to rest their judgment more upon analogy than upon the texts referred to.

NATURE OF THE WIDOW'S TENURE.—The nature of the tenure by which a widow holds property which has devolved upon her by the death of her husband has given rise to much discussion, and the arguments relied on have been supported by analogies drawn from the English law of real property.

The wife has not an absolute proprietary right, neither can she in strictness be called a tenant for life, for the law provides her successors, and restricts her use of the property to very narrow limits. She cannot dispose of the smallest part, except for necessary purposes, and certain other objects particularly specified.

It follows, then, that she can be considered in no other light than as a holder in trust for certain uses; so much so, that should she make waste, they who have the reversionary interest have clearly a right to restrain her from so doing. What constitutes waste must be determined by the circumstances of each individual case. The law has not defined the limits of her dis-

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cretion with sufficient accuracy, and it was probably never in the contemplation of the legislator that the widow should live apart from, and out of the personal control of her husband's relatives, or possess the ability to expend more than they thought right and proper. In assigning a motive for the ordinance, that a widow should succeed to her husband, and at the same time that she should be deprived of the advantages enjoyed by a tenant for life even, it seems most consistent with probability, that it originated in a desire to secure against all contingencies, a provision for the helpless widow, and thereby prevent her from having recourse to practices by which the fame and honour of the family might be tarnished. By giving her nominal property she acquires consideration and respectability, and by making her the depositary of the wealth, she is guarded against the neglect or cruelty of her husband's relatives. At the same time, by limiting her power, a barrier is raised against the effects of female improvidence and worldly inexperience. This opinion receives corroboration from the distinction that prevailes in the Benares school, which may he said to be the fountain and source of all Hindoo law, *Sir W. H. Macn. Prins. H. L.* p. 21.

By the Hindoo law of inheritance a childless widow takes as heir, but it is only a special or qualified estate, *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, 8 *Moore's In. Ap* 550.

In this case the lords of the Judicial Committee in delivering judgment, said: "With reference to the authorities which speak of the widow's interest as a life estate, it was justly observed in the course of argument that great confusion arises from applying analogies derived from the English law of real property to the Hindoo law of inheritance, and that when so applied, the terms by which we describe estates in land under the English law are more likely to mislead, than to direct the judgment aright. It may, however, be doubted whether the argument on behalf of the respondent does not really require some such process of reasoning to support it. The Hindoo widow, it was urged, had an estate of inheritance, not a life-estate. The original estate, it was said, devolves upon her in a course of succession derived from the husband, who had in him an estate of inheritance which she takes as heir. Yet what is this in effect, but to apply the English law regulating the descent of lands in fee-simple from ancestor to heir?"

It is clear that under the Hindoo law the widow, though she takes as heir, takes a special and qualified estate. Compared with any estate that passes under the English law by inheritance, it is an anomalous estate. It is a qualified proprietorship, and it is only by the principles of the Hindoo law that the extent and nature of the qualification can be determined.

In nature of an estate tail.—The interest of a Hindoo widow

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succeeding to the principality of her husband is similar to that of a tenant entail by the English law as representing the inheritance, *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 *Moore's In. Ap.* 539.

The widow in Western India has only a particular estate for life in the immoveable separate property of her deceased husband, *Jumiyatram* and *Uttamram* v. *Bai Jamna*, 2 *Beng. H. C. R.* 10.

WIDOW'S RIGHT TO ACCUMULATIONS OF JOINT ESTATE—MAINTENANCE.—A Hindoo testator, after devising his real and personal estate absolutely, amongst his five sons, said, in clause 11, "Should any amongst my said five sons die, not leaving any son from his loins, nor any son's son, in that event neither his widow, nor his daughter, nor his daughter's son, nor any of them will get any share out of the share that he has obtained of the immoveables or moveables of my said estate. In that event of the said property, such of my sons and sons' sons as shall then be alive, they will receive that wealth according to their respective shares. If any one act repugnant to this, it is inadmissible. However, if any sonless son shall leave a widow, in that event she will only receive 10,000 Company's rupees for her food and raiment." The family remained joint, Surrupachuntar, one of the sons, died, but leaving a widow his heir-at-law :—held, that upon the death of her husband without male issue his interest in the capital of the estate determined, and that his widow became entitled to hold, and enjoy as a Hindoo widow, a fifth part of the accumulations from the testator's estate from the time of his death to the death of his son, Surrupachuntar, and that she was also entitled absolutely in her own right to the interest and accumulations which, since her husband's death, had arisen from such fifth part of the accumulations.

She was declared entitled to the 10,000 rupees given by the will, with residence in the family dwelling-house, and participation in the means of worship, the amount of her maintenance as a Hindoo widow being left open by the Judicial Committee, as that point could be raised on further directions after taking the accounts, *Sreemutty Soor Jeemoney Dossee* v. *Denobandoo Mullick*, 9 *Moore's In. Ap.* 125.

WIDOW'S POWER OVER HER HUSBAND'S PROPERTY.—It must be observed that a widow has not the same power over property inherited by her from her husband as she has over her Stridhana, or woman's property, 1 *Stra.* 25, 137; and that the descent of one differs from the other, *ib.* Her Stridhana goes to her heirs. Her husband's property reverts, after her death, to his heirs. See Stridhana.

A deed of arrangement and release in the English form between members of a Hindoo family, in respect of certain joint-estate, claimed by a childless Hindoo widow, of one of the co-heirs, in her character of heiress, and legal personal representative of her de-

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ceased husband, declared that she was entitled to the sum therein expressed, as the share of her deceased husband, "for her sole absolute use and benefit." Held, that these words were not to receive the same interpretation as a court of equity in England would put upon them, as creating a separate estate in the widow, but that the deed must be construed with reference to the situation of the parties, and the rights of the widow by the Hindoo law, and that, as the deed recited that she claimed and received the money as her husband's share in the joint-estate, as the heiress and personal representative of her deceased husband, such words must be construed to mean, that it was held by her in severalty from the joint estate, and as a Hindoo widow she had only a life-estate in the *corpus*, the same at her death devolved as assets of her deceased husband, upon his personal representative in succession, *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*, 6 *Moore's In. Ap.* 1.

WIDOW'S RIGHT IN UNDIVIDED ESTATE.—Upon the principle of survivorship, the right of the co-parceners in an undivided estate over-rides the widow's right of succession, *Katama Natchiar* v. *Rajah of Shivagunga*, 9 *Moore's In. Ap.* 540.

WIDOW MUST BE CHASTE.—Chastity seems to be the only condition imposed upon the widow's right of inheritance. *Sir Thos. Strange, H. L.* vol. i. pp. 45, 136, says, Chastity is a necessary title to inheritance, adultery subjecting her to degradation from caste, for the loss of which she forfeits her right to inheritance.

The *Mitac.* ch. ii. s. i. § 39, says, that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue. *Sir Thos. Strange* observes, p. 45, (but at p. 172 takes the same view as the *Mitacshara,*) that adultery subjects the woman to degradation from caste, by the loss of which, he says, she forfeits her right of inheritance. It may be a question, since the enactment of Act xxi. of 1850 of the Government of India, whether an unchaste wife, by losing caste, forfeits likewise her right of inheritance. *Sir Thos. Strange* would appear to suppose that the forfeiture of inheritance depends on the wife's degradation from caste in consequence of adultery. If the forfeiture depends upon the degradation from caste, the Act would protect her right, and under its provisions she might claim the inheritance. The *Mitacshara,* however, says nothing about her degradation from caste; on the contrary, the author lays it down as a settled rule that "a wedded wife, being chaste, takes the whole estate." Her right to the inheritance, therefore, would seem to depend upon her chastity, which she must abandon previous to being degraded, and whether she has been degraded or not depends upon her husband. Her right to inheritance depending upon her chastity, we are inclined to think the instant she becomes unchaste she loses that right.

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The cases in the Appendix support this view. In all the cases we have been able to consult, the proof of incontinence, or infidelity appear to have been positive. The *Mayukha*, on the other hand, p. 102, lays it down that even a suspicion of incontinence is enough to reduce the widow's rights to that of mere maintenance. "This, it seems to us, can hardly mean vague suspicion. It must be a reasonably well-grounded suspicion short of actual proof. In this case, for instance, had Rumea gone off with Sitaram alone, and been proved afterwards to have been in company with him at a distance from her husband's residence, this would have constituted, as it seems to us, a case of suspicion sufficient to deprive her of the inheritance (on the authority of the *Mayukha*.)" See goods of Dadoo Mania, *Indian Jurist*, October 26, 1862, p. 59.

But nothing short of absolute infidelity in this respect disqualifies. When the inheritance once vests in her, it is not liable to be divested unless for loss of caste, unexpiable by penance, and unredeemed by atonement, 1 *Stra. H. L.* 136 ; 2 *ib.* 270, 272, *C. Sir Thos. Strange* is not supported in this by the authorities he has cited, neither is the opinion of *Mr Colebrooke*, p. 272, vol. 2, *Stra. H. L.* supported by the authority to which he refers ; § 37, s. i. ch. ii. of *Mitac.* would appear to discuss the widow's right to succeed to the inheritance, and not the subject of forfeiture after the inheritance has once vested in her. This is evidently the view taken of the text of *Harita*, in § 39, nor is *Mr Colebrooke* supported by the authorities referred to in p. 273 of vol. 2 of *Stra. H. L.* The opinion of *Sir Thos. Strange* is based upon the opinion of of *Mr Colebrooke*, whose opinion is not borne out by the authorities on which he relies. It is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving male issue, *Mitac.* ch. ii. s. i. § 39 ; 1 *Stra. H. L.* 134 ; *Morl. Dig.* 279, 316, 318 ; 8 *Moore's In. Ap.* 543 ; *Sibhoo Singh* v. *Posthu Singh*, 10 *N. W. P. R.* 420.

As to the general doctrine that proved infidelity before widowhood disqualifies, and proved incontinence after widowhood divests inheritance, the authorities seem to clash (see Act xxi. of 1850;) as to the nature of the proof of incontinence that disqualifies, there is again a discrepancy in the authorities. *Sir Thos. Strange*, p. 136, after laying down the principle that an unchaste wife is excluded from the inheritance, adds that "nothing short of actual infidelity in this respect disqualifies."

Consequences of infidelity.—If adultery be committed with a man of low caste, it is said that the wife's life is in her husband's power. Some writers protect her person in cases of infidelity with men of the higher caste. But all agree as to forfeiture of inheritance in the former case, 1 *Stra. H. L.* 45. She is subjected to extreme mortification, bare necessary subsistence, and her husband

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may marry again, though her own marriage may remain undissolved, *ib.* 45.

Adultery with another man's wife amongst the Hindoos is punishable, if committed with a priest, by ignominious tonsure, and in other cases with loss of life, and the case may be proved from circumstances. But in the Queen's Courts it would be actionable, as it does not come under either of the two subjects which these courts are called upon to administer according to native law, 1 *Stra. H. L.* 46. See *Civil Procedure Code,* s. 1.

The criminal code punishes by imprisonment and fine the man, while the woman is allowed to escape unscathed, *Indian Penal Code,* Act xlv. of 1860, s. 497.

The husband is not entitled to damages from the adulterer, the Hindoo law not providing for discretionary damages on any account, *Stra. Man.* § 33.

ABANDONMENT OF A BLAMELESS WIFE.—If a husband abandons a blameless wife he is punishable, but his wife is entitled to a third of his property as a separate maintenance, 1 *Stra. H. L.* 46; *Yajnavalchya,* 2 *Dig.* 420. And there seems to be no reason why she should be deprived of any of her rights of inheritance on failure of male issue.

WIFE'S SPECIAL PROPERTY.—Besides the contingency of succeeding as heir to her husband, a Hindoo wife has special rights of two kinds—viz., 1. *Stridhana,* or woman's property consisting of money, land, jewels, or other ornaments; and, 2. Whatever is not stridhana. This is possessed by the wife, subject to the direct and unlimited control of her husband. Thus, what she acquires by her industry, or obtains from strangers, or inherits on failure of nearer heirs, 1 *Stra. H. L.* 50. *Sir Thos. Strange* cites with reference to these two sources of the wife's property, the following passage from *Jagannatha,* "No argument is found to show why a woman should not have independent power over that which she has gained by arts, or which has been given her by a stranger on a religious consideration, or through friendship, but should have independent power over that which was received as a bribe.* The same learned author adds, It is necessary also in every case of ornaments belonging to her, to distinguish between such as were given to her by her husband, or some of her relations on, before, or connected with her marriage, and those worn by her occasionally, and not having been so given, the latter not being her property, but her husband's, descendible to his heirs, she surviving, but it is otherwise if they were habitually worn by her, in which case they are not partible. See *Stridhana.*

WHERE WIFE DIES WITHOUT ISSUE—THE HUSBAND SURVIVING.—If the wife die in the lifetime of her husband without issue, her property will go to him, or his sapindas, (nearest kinsmen,) allied

* Meaning the gifts presented as an inducement to marriage.

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by funeral oblations, provided the marriage was in an approved form; if otherwise, to her father. There seems some doubt whether this rule applies to that part of her property only which is acquired at the time of her marriage, 1 *Stra. H. L.* 51.

THE SON-IN-LAW never takes, as he is not in the line of heirs, *Mad. D.* 251 of 59, and 78 of 61.

In *Rajchundra Das* v. *Dhunmani*, 3 *S. D. A. Rep.* 362, it was determined that, according to the Hindoo law as current in Bengal, on the death of the widow who had claimed her husband's property, her daughter will inherit, to the exclusion of her husband's brother, if the daughter has, or is likely to have, male issue; and on her death, without issue, her father's brother will inherit, to the exclusion of her husband.

WHERE SHE LEAVES ISSUE.—Where the wife leaves issue, her property will go to her immediate descendants, whether daughters or grand-daughters. The latter take per *stirpes*—*i.e.*, according to the root; the unmarried or unendowed of the one or other taking first. Where there are daughters and grand-daughters, it vests in the daughters exclusively, subject to such a provision for grand-daughters as usage may warrant. Daughters take equally, subject to the above, of married and unmarried; and failing the latter, the husband and his relatives, 1 *Stra. H. L.* 51.

ON RE-MARRIAGE.—Except among some of the lower castes, no widow could marry again; but Act xv. 1856, s. 1, now permits it —provided no such widow, marrying again, shall inherit the property of her first husband, unless he allows it.

DAUGHTERS.—Assuming that the deceased has left neither sons nor a widow, but daughters, they come next in succession. The daughter takes as a principal in her own right, in default of the widow, who has precedence.

In *Jim. Vahana*, ch. xi. s. ii. § 1, it is said the daughter's right of succession is declared. *Menu* and *Narada* say, The son of a man is even as himself, and the daughter is equal to the son: how then can any other inherit his property, notwithstanding the survival of her who is, as it were, himself? *Menu*, ch. ix. § 130. *Narada* places her right of inheritance on the ground of her continuing the line of succession: "On failure of male issue, the daughter inherits; for she is equally a cause of perpetuating the race, since both the son and the daughter are the means of perpetuating the father's line," *Narada*, 13, 49.

The line of descendants here intends, such descendants as present funeral oblations; for one who is not an offerer of oblations confers no benefits, *Jim. Vahana*, ch. xi. s. ii. § 1. Her son only presents such oblations, *ib*. i. § 2.

DAUGHTER'S RIGHT AFTER DEATH OF SONLESS WIDOW.—A Hindoo, an inhabitant of Bombay, entitled to separate moveable and immoveable property, died without male issue, leaving a widow, four daughters, a brother, and the male issue of other deceased bro-

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thers. The widow is entitled to the moveable property absolutely, and to the immoveable property for life. Subject to the widow's interest the immoveable property descends to the daughters absolutely, in preference to the brother, and the issue of the deceased brothers, *Pranjeevandass Toolseydass* v. *Dewcooverbaee*, 1 *Bomb. H. C. R.* 131. This case was decided by the High Court of Bombay. The judgment of *Chief-Justice Sausse* is set out in a note to 9 *Moore's In. Ap.* 528. His Lordship said:—"There are two grounds of claim—1st, That plaintiffs were entitled to the property as members of an undivided family; 2dly, That even if Ramdoss was to be considered as having separate estate, yet that he willed it in such a way to charity, that the bequest was void for vagueness, and so the plaintiffs were entitled to come in, as heirs of Bhagwandas." His lordship considered the property was divided and separate, and that there was power to will it away. So far plaintiffs' case failed, and they ought then to show that they were heirs under a void bequest.

The first question remaining is, Whether this devise is a good charitable devise? His lordship held the devise void, and the property became, undisposed of residue, according to Hindoo law.

The testator left a widow and daughters. We must first consider what estate the wife took, the husband dying, leaving separate property.

I have felt considerable difficulty in coming to any conclusion, as the schools are so conflicting, and it is difficult to follow the reports of the *Adawlut*. The books that are of authority in this side of India are three: *Menu*, *Mitacshara*, and *Mayukha*. *Colebrooke* speaks of the *Mayukha*, 2 *Stra. H. L.* 318. The next in authority is the *Mitacshara*, which *Borradaile* mentions in his reports; and he says, that these three books are generally referred to in this part of the country. I also had inquiries made of the *Shastrees*, here and at Poonah; and they say these three books establish the usage, and have been referred to, for the last eighty years at least, as authorities here on the law of inheritance. The *Daya Bhaga*, referred to in *Sir Thomas Strange's* work, is of the Bengal school. I was led to make these inquiries, because *Strange* refers to Bengal books—the Bengal law being different. Then, according to these three books, what does the widow take? All the authorities, both in Bengal and here, are in unison as to the right of the widow to succeed where the property is separate, and in the former, to undivided also; but her power over it is said to be limited on the Bengal side, and she is merely treated as tenant for life. But on this side there appears to be a different practice, which appears to be founded on the authority of the books I have named. In 1 *Stra. H. L.* 247, he says, The restriction of a widow is limited, and concerns land only; but as to personal estate, greater latitude is given. He cites the *Bengal Reports* of 1812, and *Borrodaile's Reports*, 428. I cannot get the *Bengal Reports*,

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but *Borrodaile's* does not bear him out. In *Steele's Summary*, § 25, p. 42, published by the Bengal Government in 1821, it is stated that the widow holds the moveable property absolutely, but of land is merely tenant for life. He there refers to the *Mitacshara*, which says, Therefore it is a settled rule that the widow takes the whole estate when separate, if living chaste. The *Mayukha* lays down the proposition very much in the same way, and says, The widow takes the moveable and immoveable property.

On the questions submitted to the Shastrees, it appears that the widow has power over the whole estates for proper purposes, and over the immoveable property she is limited to the use of it for life, but can mortgage or sell it for necessary purposes. But she is bound to exhaust the moveable before resorting to the immoveable property, the latter being an object of care to the Hindoo law, with a view to preserve it for the heirs. The cases are conflicting; but I find that over the moveable she has power, but that it is denied to her over the immoveable; and in Madras that a widow may give away, during her life, personal property, but cannot will it. See 2 *Morl. Dig.* p. 69.

On the whole, I think that the spirit and practice of Hindoo law, as existing in Western India, will be best construed by treating the widow as having uncontrolled power over the moveable estate, but not having more than a life interest over the immoveable estate.

The widow has, by the text-books, a number of duties thrown upon her as to spending money; but they are of that character that it would be impossible for the Court to carry them out. In Bengal, dealings by a widow with the immoveable estate are legally, but not morally, good. But I am not aware that it has been so held here. I have therefore come to the conclusion that, in regard to immoveable property, her estate is in the nature of that of a tenant for life.

The widow, therefore, not having full power, we must see who are entitled. In this case, there are daughters; now, according to all the authorities, the daughters take next after the widow. But what is the nature of the estate they take? And here there are differences of opinion. But dealing with the question according to the three books I have mentioned, it appears to me that the daughters take an absolute estate. That the separate property they take by inheritance from the father ranks as *stridhana* is asserted by the *Mitacshara;* but this is denied by *Strange*. But the practice, as far as my search goes, does not agree with the *Mitacshara;* therefore I think it is not expedient or consonant with practice, to hold that property coming to daughters by inheritance is *stridhana*, but merely the immoveable part of it. *Strange* says, Neither does such property go as *stridhana*, but according to Southern authorities, it classes as *stridhana;* but going to the fountain of law, *Menu*, as quoted in the *Mayukha*, p. 103, s. 10, we

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have it laid down, that in default of sons, daughters are treated as sons, and take absolutely. With reference to this point also, I consulted the Shastrees, both here and at Poonah, the question being, Whether daughters could alienate any, and what portion of the property derived from their father, who died separate? The answer was, That daughters obtaining property could alienate it at their will and pleasure; in this the Shastrees of both places agree. On reviewing the authorities in 3 *Dig.* 405, where it was held, that daughters have a right to alienate property inherited, I have come to the conclusion, that daughters take the immoveable property absolutely, when it comes to them after the death of the mother, and that the plaintiffs have no *locus standi*. See *Rangasvami Ayyangar* v. *Vanjulatammal*, 1 *Mad. H. C. R.* 28; and *Perammal* v. *Venkatammel*, *ib.* 223.

This decision seems to be correct, with the exception of that point which refers to the distinction drawn between moveable and immoveable property, no reason appearing for such distinction.

In the *Mitacshara*, ch. ii. s. ii. § 1, On the right of a daughter and daughter's son, it is laid down on failure of her, (that is, the widow,) the daughters inherit, § 2, is as follows. Thus *Katyayana* says, Let the widow succeed to her husband's wealth, provided she be chaste, and in default of her, let the daughter inherit, if unmarried. This expression is shown in the following sections in the *Mitacshara*, not to be restrictive but preferential only, as between married and unmarried daughters. See the judgment of *Chief-Justice Sausse* in *Venayak Anandroo* v. *Lakshimi*; 9 *Moore's In. Ap.* 532, *ante*.

Sir Thomas Strange says, The right of daughters to succeed in default of sons and widows is not to be confounded with that of the appointed daughter under the old law. That appointment was one of the many substitutions for a son, and by a fiction, now obsolete, regarded as one, 1 *Stra. H. L.* 137.

The appointed daughter derived her title from the will and act of her father. The daughter succeeding derives hers from the law, having regard to the general principle of conferring at his obsequies benefits on the deceased, *Menu*, ch. ix. § 132.

Their order of succession.—Daughters take in common. If there is but one unmarried daughter, she takes the whole inheritance first, to the exclusion of her sisters during her life. After the decease of the single daughter the married next enjoy it, 1 *Stra. H. L.* 138.

Among daughters, the unmarried take first. After them, the married daughters having male issue, or with probability of having it, and the widowed daughters with male issue, 1 *Stra. H. L.* 138. All of which three latter classes inherit jointly, *Smriti Chandrika*; *Stra. M. H. L.* § 328.

After these, the barren married and the sonless widowed daugh-

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ters succeed. These also take jointly, *Mitac.* ch. ii. s. xi. § 13; *Stra. M.* § 329.

Those with male issue, or the probability of it, are preferred, because the performance of the funeral rites can be continued from generation to generation better by their sons than others. In each class the unendowed take before the endowed, *Mitac.*, ch. ii. s. xi. § 13.

What constitutes endowment is not settled. But *Mr Strange* considers that it should be sufficient for maintenance, *Stra. Man.* § 330. Daughters, in each class, succeed jointly, and share alike. But this relates to succession from the father. If succession be derived from the mothers, where the father may have had a plurality of wives, the daughters take by succession, according to their mothers, *Stra. Man.* § 331.

In Bengal.—According to the Bengal school, the unmarried daughter is first entitled to the succession. If there be no maiden daughter, then the daughter who has, and the daughter who is likely to have male issue, are together entitled to the succession,* and on failure of either of them the other takes the heritage. Under no circumstances can the barren daughters or widows destitute of male issue, or the mothers of daughters only, inherit the property, 1 *Macn. Prins. H. L.* 21; *Jim. Vahana*, ch. xi. s. ii. § 3, 8; 1 *Morl. Dig.* 319, 335, 480.

In Benares.—This rule does not obtain in the Benares school, that school holding that a maiden is, in the first instance, entitled to succeed, failing her, the married daughters succeed; the indigent, excluding the wealthy daughters, 1 *Stra. H. L.* 139; but in default of the former, the latter are competent to inherit. But no preference is given to the daughter who has, or is likely to have male issue, over a daughter who is barren, or a childless widow, *Macn. Prins. H. L.* 22.

In Bombay.—It has been held by the High Court that, as between two married daughters, the circumstance of having a son is no qualification on this side of India, giving the married daughter having a son a prior claim to inheritance of her parents' property over the married daughter not having a son, such priority of claim depending on the several daughters being respectively endowed, (sadhan, *i.e.*, with wealth,) or unendowed, (nirdhan, *i.e.*, without wealth,) the unendowed daughter having the preference, *Bakubai*, v. *Manchhabai*, 2 *Bomb. H. C. R.* 5; 1 *Stra. H. L.* 138; *Mitacshara; Mayukha.*

In Mithila.—The Mithila law gives the preference to the unmarried over the married daughter.

Failing her, the married daughters are entitled to take. There is no distinction made amongst the married daughters; and one

* A distinction is made by *Srikrishna*, in his commentary on *Jim. Vahana*, in respect of unmarried daughters. He is of opinion that the daughter who is not betrothed is first entitled to the inheritance. In her default, the daughter who is betrothed. But this doctrine is not endorsed by any other authority, and the author of *Dayarahasya* expressly impugns it as untenable, *Macn. Prin. H. L.* 21, n.

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who has, or is likely to have, male issue is not preferred to one who is widowed and barren; nor do indigence or wealth give a preferable title, *Macn. P. H. L.* 22. This school divides the property equally between poor and rich, mothers and childless. See *Chintamani*, 293.

APPLICABLE IN EVERY POSSIBLE CASE.—In Bengal, the above rule of succession is applicable in every possible case.

But in other schools, only where the family is divided; for, according to the doctrine of those schools, even the widow, to whom the daughter is postponed, can never inherit where the family is united, nor can the mother, daughter, daughter's son, or grandmother. The father's heirs, in such case, exclude them. But though the schools differ on other points, they concur in opinion as to the manner in which such property devolves on the daughter's death in default of male issue.

According to the Southern authorities, it classes as her Stridhana, and descends accordingly to her heirs, *Macn. Prins. H. L.* p. 22; but he cites no authority. In a note to the same page, he comments on the passage of *Sir Thos. Strange*, already quoted, wherein he treats property devolving on a daughter by inheritance as the daugher's Stridhana, and descendible as such. *Macn.*, however, at p. 38, cites the *Mitac.*, which treats property acquired by means of inheritance as Stridhana. See *ante*, Stridhana, pp. 176, 274.

According to the law of Bengal also, it reverts to her father's heirs. *Sir Thomas Strange* asserts that property devolving upon a daughter by inheritance, is classed by the Southern authorities as Stridhana, and descends accordingly to her heirs, vol. i. p. 140.

We have discussed this subject at p. 274.

It should seem, therefore, that the husband takes no interest in the *corpus* of such property. Nor has the daughter any power over it beyond her life interest. *Sir Thomas Strange* says the daughter's own power over it is greater than that of the widow of the deceased, whose condition is essentially one of considerable restraint, vol. i. p. 140.

Macn. Prins. H. L. p. 23, mentions a curious case which arose in Bombay, involving the daughter's right of inheritance. Of two widows, one had two sons, and the other a daughter. On the death of the latter widow, it became a question who was to succeed to her property, whether her daughter, or the rival widow's sons. Various authorities were consulted, and they inclined to the opinion that the daughter was not entitled to succeed as heir, inasmuch as property, which had devolved on a widow, reverts at her death to her husband's heir, among whom the daughter would have ranked in default only of her own brothers.*

Woman's separate property goes to her daughters unmarried and unprovided for, *Gautama*, 28, 22; *Mitac.* ch. ii. s. 11 § 4; *ib.* ch. i. s. 3, § 11.

* This case is very obscure. It does not appear whose was the property or how the widow succeeded, there being sons.

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SELF-ACQUIRED PROPERTY.—It may safely be stated as a true proposition that property, which is not ancestral, is self-acquired, in whatever way the property may have been obtained, whether by gift, or purchase, or labour, mental or physical, or otherwise. When a zemindary was escheated on the death of the last zemindar the Government granted it anew to a distant relation of his. This was treated as self-acquired property in *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 *Moore's In. Ap.* 595. That case has decided that *all* self-acquired property devolves in the same way as the family property of a divided member. Failing male issue, therefore, a widow takes the self-acquired property of her husband. No doubt, on the failure of male issue and a widow, the daughter would take, 9 *Moore's In. Ap.* 616.

DAUGHTER'S SONS.—According to the law of Bengal and Benares the daughter's sons inherit in default of the qualified daughters.

Vishnu says—If a man leave neither son, nor son's son, nor [wife nor female] issue, the daughter's son shall take his wealth, for in regard to the obsequies of ancestors, daughter's sons are considered as son's sons. This is not found in *Vishnu's Institutes*, but cited under his name in the *Smriti Chandrika*, note to *Mitac.* ch. xi. s. ii.

Menu likewise declares, "By that male child whom a daughter shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son's sons. Let that son give the funeral oblation, and possess his inheritance," 1 *Morl. Dig.* 258, 319, 325.

As to the law of Mithila, see *Chintamani*, 294.

A Hindoo died possessed of self-acquired property in land, leaving no sons, or son's sons, but one widow, Rambai, and two daughters, Jamna, his daughter by Rambai, and Suraj, his daughter by an elder wife, who predeceased him. Rambai succeeded to all her husband's property as his sole surviving widow, and held it for her life. Suraj died in Rambai's lifetime, leaving two sons—held, that the daughters, as co-heiresses, took an estate in remainder, vested in interest on their father's death, and that such vested right on the death of one of them during the widow's lifetime passed by inheritance to her sons, who, upon the widow's death, became entitled to enter into possession of their mother's moiety as her representatives, *Jamiyatram* and *Uttamram* v. *Bai Jamna*, 2 *Bomb. H. C. R.* 10.

Arnould, C. J., in giving judgment, said, The defence set up by the special appellants was, that they, as the sons of Suraj, one of the two daughters who survived Kashiram were, on the death of Kashiram's widow, entitled both by Hindoo law and by the custom of their caste to share Kashiram's land equally with their paternal aunt Jamna, his other surviving daughter; that Jamna's claim was not as heir of Rambai, who, as widow, took only a life interest in Kashiram's land, but as the heir of Kashiram.

It may be well to state at once that, as no caste-custom, mate-

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rially, if at all, varying from what we consider to be the general rule of Hindoo law applicable to the present case, appears to have been made out in the Courts below, and was certainly not seriously relied on in this Court on behalf of the special appellants, the case will be considered by us solely with reference to what in our view is the general rule of Hindoo law on the subject. The Munsiff decided the case in Jamna's favour, on the ground that she was the heir of Rambai.

The senior assistant judge remanded the case to the Lower Court.

It came again before the same Munsiff, who again decided in favour of Jamna, on the ground that the title by inheritance was established alike by Hindoo law and caste-custom. On appeal the acting judge of Surat confirmed the Munsiff's decree on the ground that Suraj (the mother of the then appellants) was admitted never to have had possession in Rambai's lifetime, that on Kashiram's death the land passed to Rambai, and that, therefore, as he conceived, there could be no doubt that Jamna, Rambai's only child, was her heir, and entitled to the lands.

This argument was abandoned on the special appeal to this Court.

Indeed, considering what must be taken to be the established doctrine in this Court, with regard to the extent of a widow's interest in landed property, to which she succeeds on the death of her husband, such an argument could not well be relied on.

It was, in effect, conceded that Jamna must claim as heir to her father Kashiram ; but it was contended, that claiming in that capacity she had an exclusive right to the whole of the lands, as against the sons of his other daughter, Suraj, who, though she had survived her father, had died before the termination of the life estate of the widow.

In effect, it was contended that the respective claims of those who, but for the existence of his widow Rambai, would have inherited on Kashiram's death, must be decided by reference, not to the state of things that existed at the death of Kashiram, from whom the inheritance descended, but by the state of things that existed on the death of the widow, the inheritrix of the intermediate estate for life.

In support of this, many authorities were cited, the effect of which was stated to be as follows—viz., that the established order of succession in Hindoo law to the immoveable property of a man dying separated, without direct descendants in the male line, is this :—1. Widow ; 2. Daughters ; 3. Daughters' sons, *Mitac.* ch. ii. s. ii. § 1, 6 ; *Daya Bhaga*, ch. xi. s. ii. § 1, 25, 29 ; *Vyavara Mayukha*, ch. iv. s. viii. § 13. There can be no doubt that the authorities cited, and which in effect, with the exception of the *Mayukha*, are the same as those relied on by *Sir Thomas Strange*, 1 *H. L.* 130, do establish the above proposition, which is often stated in this form : On failure of male issue, the widow

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inherits; on failure of the widow, the daughters; on failure of daughters, the daughters' sons.

But though this proposition must be considered as well established, it does not touch the real question involved in this case, which is in effect this, Whether the doctrine of representation, which in Hindoo law undoubtedly prevails in the case of sons,* prevails likewise in the case of sons of daughters?

This question as regards the claim of the sons of a daughter who has died in the lifetime of their grandfather's widow, against another daughter of the grandfather, who has survived the widow, (which is the present case,) may be put thus—Do or do not the daughters of a separated Hindoo who has died, leaving no male descendants in the direct male line, take on their father's death a vested estate in remainder as co-heiresses subject as to its coming into possession, to the particular life estate of the widow?

The point is by no means a clear one. It would appear to turn mainly on the determination of the two following points:—

1. The nature of the widow's estate. 2. As to how far the sons of daughters can be regarded as bearing a similar relation in respect of funeral obsequies to the grandfather as that borne by the sons of sons.

1. As to the first point—viz., the nature of the estate which the widow of a separated Hindoo takes on his death in his immoveable property was in effect settled by an elaborate decision of the point, pronounced by *C.-J. Sausse* in the late Supreme Court, after an exhaustive reference to all accessible printed authorities, and the consultation of many learned Hindoo Shastris, a decision well known on the other side of the Court as *Devkuvarbai's* case, and which has since been confirmed in the Privy Council in a case decided there in the early part of the present year, (*Vinayak Anandrao* v. *Lakshimibai*, 1 *Bomb. H. C. R. P. C.* 117.) That decision was, that on this side of India the widow of a separated Hindoo takes only a life estate in the separate immoveable property of her deceased husband. The notion that, according to the *Mitacshara*, such property forms part of the widow's *Stridhana*, and as such goes on her death to *her* heirs, not her *husband's*, was founded on a passage of *Sir Thomas Strange*, ch. x. on widowhood, 1 *H. L.* 248, which was itself based on a mistaken reference to the *Mitacshara*.

The *Mitacshara*, ch. ii. s. xi. § 2, undoubtedly classes property acquired by inheritance under the widow's *Stridhana*, but (as pointed out in *Devkuvarbai's* case) § 4 of the same chapter and section conclusively shows that the words "property acquired by inheritance," as used in clause 2, relates only to what has "been

* "The doctrine of representation obtaining in it, if the son have died in the lifetime of the father, leaving a son, and that son also die, leaving one, and then the great-grandfather die, the great-grandson succeeds as his grandfather would have done had he survived," 1 *Stra. H. L.* 124.

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received" by the widow from her brother, her mother, or her father, *i.e.*, from her own family.*

The widow, therefore, in Western India, has only a particular estate for life in the immoveable separate property of her deceased husband.

It follows from this, that when a separated Hindoo dies, leaving landed property, and no sons or son's sons, his widow on his death takes for her life; and the daughters, on his death, subject to the widow's life estate, take an estate in remainder, vested immediately in interest, but not coming into the possession of themselves or their sons, as the case may be, until after the death of the widow.

There is a passage in *Sir Thomas Strange* (founded on a case cited in his 2d vol., appendix to ch. x. page 404, in which *Mr Colebrooke*, *Mr Sutherland*, and *Mr Ellis*, all express an opinion, which although somewhat less positive than that of the learned author, substantially agrees with his) which entirely supports the proposition, as above laid down. It runs thus:—Of that which devolves upon her, (the widow,) from him, (the husband,) he dying, leaving no son of any description, the *landed* part, or whatever comes under that description, descends on her death to *his* heirs, not to *hers*. "The *principle being*," adds *Sir Thomas Strange*, "*that it vests in those who would have taken it upon his death had she at the time not existed.*"

Now, in this case, had Rambai not existed at the time of Kashiram's death, his self-acquired landed estate, *i.e.*, the property in question in those cases (others depending on the decision) would have vested in right to his two then surviving daughters, Jamna and Suraj, as co-heiresses.

That being so, although Suraj has died during the continuance

* The word "inheritance" here does not apply. A woman can only "receive" property from her brother, but can in no case inherit from him; she may inherit from her mother and father, but the manner in which this word "received" in § 4 is used would appear to have reference to gifts bestowed upon her during the lifetime of her parents. The word "inheritance" is unrestricted in § 2, and from the note on this *par.* we find that the commentator, *Balam Bhatta*, defends the author against the writers of the Eastern School, (viz. *Jim Vahana*, ch. iv. s. i.) who do not class wealth devolving on a woman by inheritance with woman's property. A daughter is clearly in the line of heirs, and as such succeeds by inheritance, which she is capable of transmitting to her own heirs. A wife is likewise heir to her husband, but it is supposed that she does not take other than a life interest; but the daughter evidently succeeds on a different footing. We have been able to discover no passage in Hindoo law which limits her title to her father's property, to a life interest, nor are we satisfied that the rule which limits the estate of the widow is altogether free from objection; paragraphs 3–7 are the authorities on which the author of the *Mitac.* relies in support of the doctrine enunciated in § 2. The *Smriti Chandrika* apparently supports the *Mitac.* in this respect, for at § 3, s. i. ch. ix., the author, quoting from *Yajnavalchya*, classes among the modes of separate acquisition not enumerated by *Menu*, under "any other separate acquisition," woman's property, devolving on her by inheritance.

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of the widow's particular estate, Kashiram's landed property on the widow's death would vest in Jamna, and the other half in the sons of Suraj, unless there be any rule of Hindoo law which prevents the doctrine of representation from taking effect in the case of sons of daughters as well as in the case of sons of sons.

This brings us to the second point, viz.:—Is there any such rule, or are sons of daughters considered in Hindoo law to stand, though perhaps in an inferior, yet somewhat in analogous spiritual relation to their deceased grandfather as the sons of sons.

The universally admitted fact that they are in Hindoo law reckoned among the heirs of their deceased grandfather goes far towards supplying an answer to this question, for, as *Sir W. Jones* long ago pointed out, the whole Hindoo law of inheritance is based on the principle of spiritual services, to be rendered by the heir to the deceased by means of, a due discharge of, his funeral rights, 1 *Stra. H. L.* 128. *Vide ante*, p. 231.

The doctrine, however, that sons of daughters are regarded in Hindoo law as standing in an analogous spiritual relation to the deceased with the sons of the sons, does not rest on inference alone, but is supported by abundant authority.

Sir Thomas Strange, (1 *H. L.* 138,) after distinguishing between the case of an "appointed daughter" under the old law, (who by a legal faction was supposed after appointment to stand in the place of a son,) and the case of a daughter not appointed, proceeds as follows:—"The daughter *not appointed* but *succeeding* derives her title from the law, having regard to the general principle of conferring at his obsequies benefits on the deceased."

We have referred to the authorities cited by *Sir Thomas Strange* in a foot-note to this passage, and find that they fully bear out his position. The principle on which a *daughter* inherits is thus stated by *Menu*, ch. ix. § 130. "The son of a man is even as himself, and the daughter is equal to the son. How, then, can any other inherit his property, notwithstanding the survival of her who is as it were himself?" So *Vrihaspati*, cited in *Mitacshara*, ch. ii. s. ii. § 2:—"As a son so does the daughter of a man proceed from his several limbs. How, then, should any other person take her father's wealth?"

The principle on which the son of a daughter inherits—the point that more immediately interests us here, is thus stated by *Menu*—"By that male child whom a daughter, whether formally appointed, or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son's son, *Let that son give the funeral oblation*, and possess the inheritance," (ch. ix. § 136.) To the same effect is *Vishnu*—"If a man leave neither sons, nor son's son, [nor wife, nor female issue,]* the daughter's son shall take his wealth. *For in regard to the obsequies of ancestors, daughter's sons are con-*

* *Balam Bhatta.*

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sidered as son's sons," *Mitac.* ch. ii. s. ii. § 6; and see *Stoke's H. L. Books*, p. 441, note. It thus appears that, as in Hindoo law, daughter's sons are considered as son's sons in respect of their spiritual relation to their deceased ancestor; so they must be regarded as equally entitled, with son's sons, to avail themselves of the right of representation, which, in Hindoo law, like the very right of inheritance itself is ultimately founded on the principle of service to be performed to the ancestor in relation to his funeral obsequies with a view to his spiritual welfare.

On the whole then, our conclusion is, that on the death of Kashiram, his landed property vested in possession in his widow, Rambai, for her life; vested in remainder, that is, (subsequent to the widow's life estate,) in his two then surviving daughters, Jamna and Suraj. Suraj having died before the termination of the widow's life estate, her vested right passed on her death, by inheritance, to her sons, who, upon Rambai's death, became entitled, as representing their mother, to enter into the enjoyment of one half of the whole landed property of Kashiram, leaving the other half to be enjoyed by their mother's half sister, Jamna.

With all due deference to the opinion of the learned judge respecting the right of representation held to exist in the daughter's sons, we think a fallacy runs through his argument. In the first place, as respects Hindoo inheritance, the application of the technical term remainder, is inappropriate. Remainders are the creatures of grant. Inheritance springs from the law. On the death of the husband, the widow, it is true, according to the construction which the Hindoo law on this point has received, succeeded, and took a life estate. On her death it would be necessary to ascertain, who among the surviving kindred of the husband was entitled to succeed; and for this purpose the table of succession would have to be referred to, and the survivor, next in degree, would be the person entitled, and he or she would succeed in the order of degree. No provision is made in Hindoo law for representation where property descends in such case; for instance, brothers may succeed; but if, of two brothers, one survives, and the other dies leaving a son, the law does not say that the brother and nephew shall succeed together. The succession of the nephew is postponed to that of his uncle. The right of representation existing, is based amongst son's sons when a father is living in union with his sons, on a different ground from that on which the learned judge supposes the right of representation in a daughter's son is based. Sons living with their father do not succeed to their father's estate; they have an equal interest with the father; and on the father's death his share falls into the common stock, and when division occurs, the property is apportioned among those entitled to share. Grandsons, therefore, as representing their fathers, and having by birth an equal interest with them in their portions, are entitled to succeed to that part of the property to which their fathers would

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have been entitled, had they been living. It is on the principle of interest in the family property, that the right of representation in son's sons depends. Now, a daughter's son has not a joint, or common interest with her in her property. She receives the property, not as heir to her mother, but as heir to her father, standing first in degree of the kindred entitled to succession. She receives the property, therefore, in right of inheritance, and takes it, according to the *Mitac.*, as her Stridhana, daughter's sons being postponed to daughters in the table of succession. If of two daughters one dies, leaving a son, and the other survives, the succession of the son must be postponed to that of his aunt. The principle upon which the right of representation exists in respect to son's sons, does not apply to daughter's sons who have not the same interest in the Stridhana of their mothers as son's sons have in the ancestral property of the family. *Mr Strange, M. H. L.* § 316, says, with respect to the descent in the female line, of property vesting in a female, "And should it devolve on a female relative, for instance on a daughter, it would go on from her according to the rule of descent in the female line."

MITHILA SCHOOL.—But the right of daughter's sons is not recognised by the Mithila school. The *Vivada Chandra*, the *Vivada Ratnakara*, and *Vivada Chintamani* authorities current there, do not enumerate daughter's sons amongst the series of heirs.

ORDER OF SUCCESSION.—If there be sons of more than one daughter, they take *per capita*, and not as the son's sons do, *per stirpes*. *Sir Thomas Strange* states that, where such sons are numerous, when they do take, they take *per stirpes* and not *per capita*, citing 3 *Dig.* 501; 1 *Stra. H. L.* 139. But this authority supports a contrary view. *Jagannatha* there lays down the following rule :—" Again, if daughter's sons be numerous, a distinction must be made. In that case, if there be two sons of one daughter, and three of another, five equal shares must be allotted; they should not first divide the estate in two parts and afterwards allot one share to each son."

This principle was maintained also in the case of *Ramdhaun Sein* v. *Kishenkant Sein*, 3 *Sudr. D. A. R.* 100, 1821, where it was determined that grandsons by different mothers claiming their maternal grandfather's property take *per capita* and not *per stirpes*, 1 *Macn. Prins. H. L.* 24.

DAUGHTERS' GRANDSONS.—Daughter's grandsons are not in the line of heirs, *Stra. Man.* § 334.

DAUGHTERS' DAUGHTERS.—*Macnaghten, Cons. H. L.* 6, says, In the line of the daughters' male issue the descent stops with their sons. It does not extend to the female issue, *M. D.* 27 of 62, *Stra. Man.* § 332.

On failure of daughters' sons, among Soodras, illegitimate sons succeed, that is, to full shares. Half shares they are always entitled to, see *ante*, p. 234; 1 *Stra.* 132 ; *Stra. Man.* § 335, *i.e.*, if

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there are legitimate son's daughters, or sons of daughters, the illegitimate sons of Soodras get half shares.

The question was raised, but not decided, whether the interest of a daughter in the estate of her deceased father is of the same nature as that of a widow, 6 *Moore's In. Ap.* 433.

SUCCESSION IN DESCENDING LINE STOPS WITH DAUGHTER'S SON.—The succession in the descending line from the daughters does not proceed beyond her son, the funeral cake stopping with him. It is the daughter's son who is the giver of funeral oblation, not *his* son, nor the daughter's daughter, for the funeral oblation ceases with him, *Jim. Vahana,* ch. xi. s. ii. § 2, which, *Sir Thomas Strange* says, is an answer to the claims of the son's son, grounded on the property having belonged to his father, 1 *Stra. H. L.* 139.

DAUGHTER'S DAUGHTER.—According to the commentary of *Balam Bhatta,* the daughter's daughter inherits in default of daughter's sons. He grounds this opinion, for which, however, there is no authority in *Vignanesvara's* text, upon the analogy which this author has admitted in another case between the succession to a woman's separate property, and the inheritance of the paternal estate, note to *Mitac.* ch. ii. s. ii. § 6. It has been held, that where two of four daughters died during the lifetime of their mother, and one of them left a daughter, who sued her aunt for a fourth of the property in right of her mother, there was no legal foundation for the claim, 2 *S. D. A. R.* 290, *Bengal,* 1819. Moreover, when there are daughter's sons, their right of succession is postponed, for it is a right deduction that the succession of the daughter's son is next after the daughter, *Jim Vahana,* ch. xi. s. ii. § 25; 1 *Stra. H. L.* 139, so that he comes in after the other daughters of the deceased.

WHERE ONE OF SEVERAL DAUGHTERS WHO SUCCEEDED AS MAIDEN DIES, LEAVING SONS AND SISTERS.—If one of several daughters who had as maidens succeeded to their father's property die, leaving sons and sisters, and sister's sons, then, according to the law of Bengal, the sons alone take the share to which their mother was entitled, to the exclusion of the sisters and the sister's sons, 1 *Macn. Prin. H. L.* 24.

In conformity with this doctrine it was held, that property inherited by a daughter goes at her death to her son or grandson, to the exclusion of her sister, and her sister's son, 2 *S. D. A.* 26, 19th April 1820, 1 *Macn. ib.* n.

WHERE ONE OF SEVERAL DAUGHTERS WHO HAD AS MARRIED WOMEN SUCCEEDED, DIES, LEAVING SONS, SISTERS, AND SISTER'S SONS.—If one of several daughters, who had as married women succeeded their father, dies, leaving sons, sisters, or sister's sons, according to the same law the sisters exclude the sons; and if there be no sister the property will be equally shared by her sons and her sister's sons. This distinction seems to prevail in Bengal only, *Macn. Prins. of H. L.* 24.

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A. B. AND C. SUCCEED—C. DIES BEFORE A.—B. SURVIVES. —If there be three sisters, A. B. and C., who succeed jointly to their father's estate. Supposing B. to have one son, and C. to have three sons, and supposing C. to have died before A., and B. to have survived her. It is agreed that, upon the death of A. her estate will go to B., but whether, on the death of B., it shall go to her only son, or be divided between him and the three sons of C. is a *vexata quæstio*, *Macn. Cons. H. L.* 10. In reply, *Macn. Prins. H. L.* 24, says, I apprehend that if the property devolved on the daughters at the time they were maidens, then on C.'s death her property would go to her three sons, and not to her sisters. But if they were married at the time it would go to her sisters, and on the death of A. to B., and on the death of B. her sons and the sons of C. would take *per capita*, and this upon the general principle that property which had devolved upon a daughter is taken at her death by the heirs of her father, and not by the heirs of the daughter, and the father's heirs in this case are his daughter's sons, who are entitled to equal shares, *Jim Vahana*, ch. xi. s. i. § 65.

ON FAILURE OF DAUGHTER'S ISSUE ESTATE REVERTS TO FATHER'S HEIRS.—This is a moot point, whether on failure of issue the inheritance so descending on the daughter goes, like her Stridhana, to her husband surviving her, or to those who would have succeeded, had it never vested in such daughter.

Jim. Vahana, ch. xi. s. ii. § 30, says, If a maiden daughter, in whom the succession has vested, and who has been afterwards married, die, without bearing issue, the estate which was hers becomes the property of those persons, a married daughter, or others who would regularly succeed if there were no [unmarried daughter] in whom the inheritance vested, and in like manner succeed on her demise after it has so vested in her, (see 1 *Morl. Dig.* 319.) It does not become the property of her husband, or other heirs, for that [text which is declaratory of the right of husband and the rest] is relative to a woman's peculiar property, (Stridhana.) Since it has been shown, ch. xi. s. i. § 56, that on the decease of the widow, in whom the succession had vested, the legal heirs of the former owner, who would regularly inherit his property, if there were no widow, in whom the succession vested—namely, the daughters, and the rest, succeed to the wealth—therefore the same rule concerning the succession of the former possessor's next heirs is inferred, *à fortiori*, in the case of the daughter and grandson, whose pretensions are inferior to the wife's, see *Daya Krama Sangraha*, ch. i. s. ii. § 3; so that if the daughter die without issue her father's next heirs succeed. See *Stridhana*, 176.

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Section IV.

PARENTS.

Property ascends—Father—Mother—Mothers cannot alienate—Where father had other wives—Stepmother—Brothers—Sisters not included—Order of succession—Where mother succeeds father—Title rests on funeral benefits—Re-united brothers—Brother's sons or nephews—Sinless widow of undivided brother cannot separate—Daughter of former wife cannot take father's share—Brother's grandsons, nephews' sons, or grand-nephews—Brother's daughters—Daughters-in-law—United family—Daughter's son—Sister—Bengal—Bombay—Sister's sons—Niece's or sister's daughters—Succession after sister's son—In Bengal—Remote kindred—Spiritual preceptor—Benares—Mithila—Bombay—Pupil—Southern India—Holy mendicants—Dancing-girl—Prostitution—Its gains recognised—Lands endowed for religious purposes—What law governs parties who migrate from one district to another where a different school of law prevails—Caranese law—Aliya Santana—Division of family property—Malabar law—Castes following the Maroomakatayam rule—United females—Succession as Karnaven—No right to partition—The principle of partition—Alienation—Property assigned by Naya females—Judgment against Karnaven—Charges of property—Self-acquired property—Widowhood—Management of females—Maintenance—Account from Karnaven—Succession to management—Anandraven's right to maintenance.

Property ascends.—In default of issue in the descending line, the inheritance ascends, the property passing to the parents. But a difference of opinion has prevailed in the various schools as to which parent should take the precedence. Some give the preference to the father, some to the mother, and some to both jointly. The father inherits according to the Bengal school.

Mother—father.—But the mother succeeds to the exclusion of the father, according to the other schools. *Jim. Vahana*, ch. xi. s. iii. § 4, (and other authorities in Bengal) says that in the term *patirau*, "both parents" (contained in the text of *Yajnavalchya*) "the priority of the father is indicated, for the father is first suggested by the radical term *pitri*, and afterwards the mother is inferred from the dual number, by assuming that one term of two which composed the phrase, is retained." But both the Benares and Mithila schools prefer the mother to the father. The *Mitacshara*, ch. ii. s. iii., § 2, founds its preference of the mother on the use of the term *matapitarau*, (mother or father,) rather than that of *pitarau*, (parents,) and arguing thence, according to Hindoo logic, that the omission of the one, and the retention of the other, show the intention to be to give the mother the preference. In the *Mitacshara*,

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ch. ii. s. iii. § 5, reliance is placed on the propinquity of the mother to the son, it is there said, "Therefore, since the mother is the nearest of the two parents, it is most fit that she should take the estate."

But on failure of her the father is successor to the property, according to the same school, *ib.*

The commentator, *Balam Bhatta*, is of opinion that the father should inherit first, and afterwards the mother, upon the analogy of more distant kindred, where the paternal line has invariably the preference, before the maternal kindred, and upon the authority of several express passages of law, *ib.* n. 5.

Nanda Pandita, author of commentaries on the *Mitacshara*, and on the institutes of *Vishnu*, had before maintained the same opinion. But the elder commentator of the *Mitacshara*, *Visvesvara*, has in this instance followed the text of his author in his own treatise, entitled *Madana Parijata*, and has supported *Vignanesvara's* argument both there and in his commentary, named *Subodhini.*

Srikara maintains that the father and mother inherit together, and the great majority of writers of eminence (as *Apararka* and *Kalamakara*, and the authors of the *Smriti Chandrika*, *Madanaratna*, *Vyavahara Mayukha*, &c.) give the father the preference. *Jimuta Vahana*, *Raghunandana* have adopted this doctrine. But *Vachespati Misra*, on the contrary, concurs with the *Mitacshara* in placing the mother before the father, being guided by an erroneous reading of the text of *Vishnu*, s. i. § 6, as is remarked in the *Veramitrodaya*. The author of the latter work proposes to reconcile these contradictions by a personal distinction. If the mother be individually more venerable* than the father, she inherits; if she be less so the father takes the inheritance. But this is very fanciful.

Others again exclude the father altogether, and on failure of the mother pass the inheritance to the paternal grandmother, as the surer means of preserving the property in the same tribe, upon the ground that the father succeeding, the estate becomes a paternal one, and as such may devolve, as well on sons, belonging to a mixed class, as on issue by a wife of his own, whereas if taken by the grandmother it descends as a maternal one to persons of the same class, only, viz., to her daughters and their representatives, *Dharesvara*, *Mitac.* ch. ii. s. iv. § 2; 1 *Stra. H. L.* 142. But the force of this argument ceased ever since marriages with women of inferior classes became illegal, 1 *Stra. H. L.* 142.

Assuming the father to take first, in default of him the mother takes. Her interest, however, is not absolute, and is of a nature similar to that of a widow, 1 *Stra. H. L.* 144; 1 *Macn. P. H. L.* 25. But this rule seems to be more than doubtful, *ante*, p. 128. n. 1.

In a case of property which had devolved upon a mother by the

* As to the pre-eminence of the mother, see the *Vivada Changarnava*, *Menu*, *Vyasa*, the *Puranas*.

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decease of her son, the law officers of the *S. D. A.* held, that the rules concerning property devolving on a widow equally affect property devolving on a mother. On her death the property devolves on the heirs of her *sons*, and not on *her* heirs, *Macn. Prins. of H. L.* 25. But *vide*, p. 224, with reference to the Madras school.

When we come to consider the extremely fanciful grounds upon which the prior right of the mother to succeed is placed, we cannot help thinking that there can be no solidity in an argument raised upon so weak a foundation. Laying aside the ingenious argument founded upon the use of the terms *patrau, pitarau, matapitarau,* what can be more trifling than resting her prior title on the pains and merits of child-bearing, on her greater propinquity to her issue, on her being more venerable than the husband, and again, resting the priority of the father on the ground that "the seed is preferable to the soil." All these subtle and nice distinctions must give way to common sense. *Vishnu* says, If there be none, (daughter's son,) it belongs to the father; if he be dead it appertains to the mother. *Menu* says, ch. ix. s. 27, Of a son dying childless and leaving no widow, his father and mother shall take his estate; and the mother also being dead, the paternal grand*father* and grand*mother* shall take the inheritance on failure of brothers and nephews. Now, that he intended the father to take first, and the mother to succeed him is clear, for he must assume the father to be dead when he says the mother also being dead, otherwise it would be absurd to give the property over on the death of the mother, if the father were still alive, and in possession. Moreover, the same order is observed in passing the property from the mother on her death to the grandfather and grandmother.

Although *Jagannatha*, 3 *Dig.* 503, admits the point to be uncertain, yet it is evident that the bias of his judgment was in favour of the father, upon the ground of his comparative efficacy in performing obsequies to the deceased, arguing by analogy to the ground of preference to the son of a daughter, who succeeds as well to both parents, as to the brother, 1 *Stra. H. L.* 143; *Jim. Vahana*, ch. xi. s. iii. § 3.

Of a son dying childless and leaving no widow. *Menu*, according to the gloss of *Coollooca Bhatta*, says that the father and mother shall take the estate. This, according to Hindoo reasoning, establishes in the father the right of prior enjoyment. Other versions of the same text, omitting the father, have been construed to suppose the father dead, *Mitac.* ch. ii. s. iii. § 2; *Jim. Vahana*, ch. xi. s. iii. § 2; 3 *Dig.* 503; *Menu*, ix. § 185; 1 *Stra. H. L.* 143.

Amidst all these conflicting authorities, *Sir Thomas Strange* adds, Reason ought to decide between the contending views, with *Jagannatha*, in favour of the father, upon the principle that "if two texts differ, reason, or that which it best supports, must

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in practice prevail, when the reason of the law can be shown," 1 *H. L.* 143.

That the father takes first is the doctrine of the Bengal school, founded on *Vishnu* and *Menu*, resting the subsequent title of the mother, on her claims of having borne the deceased, and nursed him in his infancy, 1 *Stra. H. L.* 143.

In whatever order the natural mother inherits she is, like the widow taking as such, restricted from alienating the estate, unless for necessary subsistence, or for pious purposes beneficial to the deceased, and for this only to a very limited extent, *Mt. Bija Dibhij* v. *Mt. Unpoorna Dibeh*, 1 *S. D. A.* 164 *Beng. Rep.*; 1 *Macn. P. H. L.* 25. See *ante*, p. 224.

WHERE THE FATHER HAD OTHER WIVES.—Should the father of the person to be traced from, have had other wives, besides the mother of the individual, they do not inherit. The property passes exclusively to the individual's mother.

It is said in 1 *Stra.* 144, that stepmothers are excluded, but the Hindoo law authorities he has referred to, do not support him.

BROTHERS.—If the *father* be dead, brothers share the estate,* according to *Menu*, Of him who leaves no son, the *father* shall take the inheritance, *Menu* ix. § 185. *Macn. P. H. L.* vol. i. p. 26, says, In default of father and mother, brothers inherit, 2 *Stra. H. L.* 254.

SISTERS NOT INCLUDED.—*Nanda Pandita* and *Balam Bhatta* consider this as intending brothers and sisters, in the same manner in which "parents" have been explained mother and father, and, conformably with a rule of grammar, they give the inheritance to the brother first, and in his default to the sister. This opinion is controverted by *Kamalakara*, and by the author of *Vyavahara Mayukha*, *Mitac.* ch. ii. s. iv. note 6. Sisters are not enumerated in the order of heirs, 1 *Macn. P. H. L.* p. 26.

ORDER OF SUCCESSION.—Amongst brothers, those that are of the whole blood take the inheritance in the first instance, under the text of *Menu*, ch. ix. § 187. "To the nearest sapinda the inheritance next belongs." Since those of the half blood are remote, through the difference of the mothers, *Mitac.* ch. ii. s. iv. § 5, and take only on failure, or in default of the whole brothers. If there be no uterine, (or whole brothers,) those by a different mother inherit the estate, *ib.* § 6; *Jim. Vahana*, ch. xi. s. v. § 9, 11; 3 *Dig.* 506; 1 *Stra. H. L.* 144; 2 *ib.* 254.

Macn. Prins H. L. vol. i. p. 26, says, The order of succession is, first, the united brothers of the whole blood; second, the divided brothers of the whole blood; third, the united brothers of the half-blood; fourth, the divided brothers of the half-blood. A divided brother of the whole blood takes in preference to a divided one of the half-blood.

This order of succession supposes that the deceased had only uterine, or half-brothers, and that they were all united, or all

* See sister, *post*, 296.

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separated; but if a man die, having a uterine brother separated, and a half-brother associated, or reunited, these two will inherit the property in equal shares, *Macn. Prins. of H. L.* 26.

Assuming the mother to have succeeded the father, on her death the property devolves on the brother, for, *Vishnu*, who declares, that "if the father be dead, it appertains to the mother," proceeds to say, "on failure of her it goes to the brothers,"* and here the pronoun refers to the mother. It appears also, from the passage of *Yajnavalchya*, "both parents, brothers likewise," that the brother's succession takes place in the case of the death of both parents, *Jim. Vahana*, ch. xi. s. v. § 1. On the death of the mother the residue of the estate devolves on the brother as next heir, in the order of succession; and not like a woman's peculiar property on her son and daughter, for it is the case of an estate devolving on a woman, *Jim. Vahana*, ch. xi. sec. v. note 7, *Chudamani*.

Stridhana, or women's peculiar property, being the mother's, descends on her death to her daughters, *ante*, p. 174, *et seq.*

Sir Thos. Strange, vol. i. p. 144, says, But if the property was not *stridhana*, but was inherited by her from her son, it passes in Bengal to *his* heirs, and not to hers, *Jim. Vahana*, ch. xi. s. iv. § 7, note, who on failure of a son of the owner, or on failure of widow, or of a daughter, or of parents, are his brother or brothers.† See *ante*, p. 224.

Title rests on funeral benefits.—The title of the brother, as in other instances, rests on the benefits he confers by the offer of oblations in which the deceased owner of the property participates, and in presenting others which the deceased was bound to offer, and in this respect occupying his place, *Jim. Vahana*, ch. xi. s. v. § 3; 1 *Stra. H. L.* 145.

The uterine brother takes first, for he presents oblations to six ancestors, which the deceased was bound to offer, and three oblations in which he participates, while the half-brother presents none to ancestors.

But as he presents three, in which the deceased participates, he is therefore superior to the nephew, who accordingly, though son of a uterine brother, is postponed in the succession to his uncle of the half-blood, *Jim. Vahana*, ch. xi. s. v. § 12. A preference, nevertheless, that has been censured, 1 *Stra. H. L.* 145.

It has been suggested that the succession differs where the property has been inherited, and where it has been acquired by the deceased; but this has not been established, 3 *Dig.* 506; 1 *Stra. H. L.* 145.

* That is, the brothers of him through whom she succeeded—that is, her son. This text must refer to a divided family; for if united, the inheritance must pass direct to the brothers, and not to the mother.

† This of course assumes a separation, for if a son had united brothers the property could not have devolved upon the mother.

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Re-united brothers.—When brothers separate and afterwards re-unite, and then again separate, should any share have lapsed by death, &c., during the state of re-union, such share goes in equal parts to the re-united brothers of the whole blood, and the sisters of the whole blood. Failing brothers of the whole blood, it goes to re-united brothers of the half-blood, and sisters of the same mother, to all in equal shares, *Mitac.* ch. ii. s. ix. § 13.

Although in the succession to the estate of a grandfather the right of representation exists; that is to say, the son of a deceased son inherits with his uncle, yet where the property comes to the brother after the death of his brother's widow, the son of another brother, who died during the life of the widow, has no right to claim a share of the inheritance, because during the life of his widow the father of the son had not even an inchoate right to the property. It had never appertained to him.

In the case of *Rudrachundra Chowdhi* v. *Samhhu Chandra Chowdhry*, 3 *S. D. A. R.* 106, a question arose as to the relative rights of a brother and a brother's son to succeed on the death of a widow to property which had devolved on her at the death of her husband, they being the next heirs. In the succession to the estate of a grandfather the right of representation undoubtedly exists; that is to say, the son of a deceased son inherits together with his uncle. Not so in the case of property left by a brother, the brother's son being enumerated in the order of heirs to a childless person's estate after the brother, and entitled to succeed only in default of the latter. In the case in question the deceased left two brothers and a widow, the widow succeeding, one of the brothers died during her life leaving a son, on her death this son claimed to inherit together with his uncle. The opinion of the pundits in favour of the justice of his claim was based upon the fallacious supposition, that on the death of the first brother the right of inheritance of his other two surviving brothers immediately accrued, and that the dormant right of the brother who died subsequently was transmitted to his son, whereas, in point of law, during the life of the widow neither brother had even an inchoate right to the property, and as it had not vested in them, the one who died could not have transmitted to his son a right which never appertained to himself. This doctrine was supported in *Musst. Jymani Dibia* v. *Ramjoy Chowdhri*, 3 *S. D. A.* 289.

Brothers' sons or nephews.—In default of brothers, their line having been exhausted, their sons inherit, *Vishnu, Jim. Vahana*, ch. xi. s. vi. § 1; *Mitac.* ch. ii. s. iv. § 7; *Daya Krama Sangraha*, ch. i. s. viii. § 1; 1 *Stra. H. L.* 145. In the same order, as to division and union, the whole being preferred to the half-blood, *Jim. Vahana*, ch. ix. s. vi. § 2; *Daya Krama Sangraha*, ch. i. s. viii. § 1. As the nephew of the half-blood confers less benefits compared with the brother's son of the whole blood, since the mother and grandmother of the deceased owner do not participate in the oblations presented by

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the nephew of the half-blood to the father and grandfather of such deceased owner, *Jim. Vahana*, ch. xi. s. vi. § 1, 2; *Mitac.* ch. ii. s. iv. § 7, 8; 3 *Dig.* 518, 519, 524, 527; *Daya Krama Sangraha*, ch. i. s. viii. So the united succeed before the divided, 2 *Stra. H. L.* 254; *Srikrishna.*

In case of competition between brothers and nephews the nephews have no title to the succession, for their right of inheritance is declared to be on failure of brothers, [both parents, brothers likewise, and their sons,] *Mitac.* ch. ii. s. iv. § 8. However, when a brother has died leaving no male issue, (nor other near heir,) and the estate has consequently devolved on his brothers indifferently, if any one of them die before a partition of his brother's estate takes place, his sons do in that case acquire a title through their father, and it is fit therefore that a share should be allotted to them in their father's right at a subsequent distribution of the property between them and the surviving brothers, *ib.* § 9.

THE SONLESS WIDOW OF AN UNDIVIDED BROTHER CANNOT SEPARATE AND TAKE HIS SHARE, NOR CAN THE DAUGHTER OF A FORMER WIFE TAKE HER FATHER'S SHARE.—Where three undivided brothers lived and ate together with the mother, but traded separately, but two of the brothers died, one leaving a widow and a daughter by a former wife, the other a widow and two sons, it was held that the brothers and descendants of the two deceased could not be considered as a divided family, and the widow and her sons will be permitted to possess their father's share; but the widow of the other brother cannot be permitted to separate and take her husband's share; nor has the daughter by a former wife any right to separate and take her father's share because he died without previous separation and leaving no son; the other members of the family are however bound to maintain the widow and daughter, *Mt. Raj Koonwur* v. *Mt. Dhun Koonwur*, 1 *Borr.* 207; 1 *Morl. Dig.* 484, § 45.

But with regard to succession of brother's sons there is this peculiarity, that if a brother's son, whose father died previously to the devolution of the property, claim *jure representationis*, they take *per stirpes* with their uncle, being in that case grandsons inheriting with a son; but when the succession devolves on the brother's sons alone as nephews, they take *per capita* as daughter's sons do. In the *subodhini* it is stated that the succession cannot under any circumstances take place, *per capita.* But this opinion is rejected, 1 *Macn. P. H. L.* 27.

He maintains, also, that daughters of brothers inherit. In this opinion he is joined by *Narada Pandita*, but the doctrine is also rejected, *Macn. Prins. of H. L.* p. 27; see note to *Mitac.*

Sir Thomas Strange says, that unlike sons of daughters they take *per capita*, not claiming *jure representationis*, as if their fathers had had a vested interest in their brothers' property

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before their decease; whereas the right only vested in them by the demise of the owner, their fathers being at the time dead, 1 *Stra. H. L.* 145.

Elberling, p. 78, says, In default of brothers, brothers' sons succeed in the same order as brothers; *Vishnu, Daya Krama Sangraha*, ch. i. s. viii.; *Daya Bhaga*, ch. xi. s. vi. § 1; *Mitac.* ch. ii. s. iv. § 7. They take according to numbers,* and not by representation as grandsons. Brothers' sons are totally excluded by the existence of brothers; but when a brother has once succeeded, his share devolves, of course, on his death, on his sons, and not on his surviving brothers, even though he happens to die before a partition of the estate takes place, *Mitac.* ch. ii. sec. iv. § 9.

Amongst brothers' sons, associated and unassociated, all of the whole blood, the succession devolves exclusively on the associated brothers' sons, *Daya Krama Sangraha*, ch. i. s. viii. § 3. (See 2 *Stra. H. L.* 254; *Srikrishna.*) In like manner, in the case of associated and unassociated brothers' sons, all of the half-blood, the succession devolves on the associated brothers of the half-blood, *Daya Krama Sangraha*, § 4.

But if the son of the whole brother were unassociated, and the son of the half-brother associated, then they both inherit together, *ib.* 5.

Where, however, two nephews were either associated or unassociated with the deceased, one of the whole, the other of the half-blood, then in both instances the succession devolves on the nephew of the whole blood, *ib.* 6.

The sons of brothers who have demised before the property falls in, do not succeed while there are surviving brothers to take the inheritance, *Sir F. Macn.* 3; *Elberling* 78; *Stra. Man. H. L.*, § 343.

Brothers' grandsons.—Brothers' grandsons are not in the direct line of heirs, *Elberling*, § 78; but *Mr Strange* says they come in ulteriorly as more remote *sapindas*, *Stra. Man. H. L.* § 344.

Nephews' sons or grandnephews.—Nephews' sons or grandnephews next take in the same order, and in the same manner as nephews. But with them the succession in the male line from the father direct stops, 1 *Stra. H. L.* 146.

In default of brothers' sons, their grandsons inherit in the same order,† according to the law as current in Bengal. But the law of Benares, Mithila, and other provinces, does not enumerate the brother's grandson in the order of heirs, but assigns to the paternal grandmother the place next to the brother's son, *Macn. Prins. H. L.* 31; *Elberling*, 78; *Mitac.* ch. ii. sec. v. § 1.

* The reason is that they do not inherit in right of their father, but in their own right, and as their right is equal, their share must also be equal, *Mitac.* ch. ii. s. iv. § 7, note.

† No re-union, after separation, can take place with a grandson's brother. Re-union can take place only with the following relations:—the father, the brother, and paternal uncle, *Vrihaspati*, cited in *Jim. Vahana*, ch. ix. s. i. 30.

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The brother's great-grandson, though a lineal descendant of the owner's father, is excluded by the paternal uncle, for he is not a giver of oblations, since he is distant in the fifth degree. Thus *Menu* says, "To three, must oblations of water be made; to three, must oblations of food be presented; the fourth in descent is the giver of these offerings, but the fifth has no concern with them," *Menu*, ix. § 186, by this passage the fifth in descent is debarred, *Jim. Vahana*, ch. xi. s. vi. § 7; 3 *Dig.* 526, 527; *Daya Krama Sangraha*, ch. i. s. ix.

BROTHER'S DAUGHTERS.—Brother's daughters do not inherit, 2 *Stra. H. L.* 240, *S.*; *Stra. Man. H. L.* § 345; 1 *Macn. P. H. L.* 127.

DAUGHTER-IN-LAW does not succeed to her mother-in-law, being excluded equally with sisters and sister's sons, *Stra. Man.* § 345.

SUCCESSION IN UNITED FAMILY.—Where brothers are united, the succession differs in some respects from that which prevails where they are divided. The estimated share of each brother vests successively in his sons, son's sons, and son's grandsons, as in the case of individual property. Failing these, however, the next in the line of succession are the surviving brothers, amongst whom the lapsed share vests equally. The great-great-grandson of the deceased brother would not take it, unless kept open for him by the survival of his father, or grandfather. From the brothers the lapsed share would vest in their male issue, as far as the great-grandson. After that it would pass to the widow of the last survivor of any of these, *Stra. Man. H. L.* 347.

The widow of these previously demised would not participate. When there may be male issue of the undivided brothers, it passes from one cousin to another to the remotest degree while united, and on all these failing, then to the widow of the last survivor. It finally goes to divided relatives in their order, *Stra. Man.* § 347.

A., one of four brothers in joint possession of ancestral property, separates himself in food, worship, and estate, leaving his three brothers jointly possessed of their undivided three-fourth shares. A. dies unassociated, leaving a son and heir, B. The three brothers continue, and die associated, two without heirs, and the third leaving a son and heir, C. B. has no claim to any part of the undivided three-fourth shares as against C., who takes the whole absolutely, *Jaudubchunder Ghose* v. *Bonodbeharry Ghose*, *Hyde's Beng. H. C. R.*, 1866, p. 214.

Distant undivided relatives take before the widow, *Stra. M. H. L.* § 348.

Where there are two brothers who have not divided, and they die in succession without male issue, each leaving a widow, the widow of the last survivor alone inherits; this is, because on the decease of the brother who first died the entire property vested in the surviving brother, and so passed on to his widow, 2 *Stra. H. L.*, 232, *C.* and *D.* *Stra. M. H. L.*, § 349. Where one of two undi-

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vided brothers dies, leaving a daughter, she does not succeed; the property passes on to the surviving brother and his line, *Stra. M. H. L.*, § 350.

DAUGHTER'S SON.—The succession in the male line from the father direct, having stopped with the nephews and grand-nephews. Failing heirs of the father, down to the great-grandson, the succession devolves on his daughter's son, in preference to the uncle of the deceased, in like manner as it descends to the owner's daughter's son on failure of the male issue, in preference to the brother, *Jim. Vahana*, ch. xi. s. vi. § 8; 3 *Dig.* 527; see 1 *Morl. Dig.* 326, 328; *Daya Krama Sangraha*, ch. i. sec. 10, § 1.

The succession of the grandfather's and great-grandfather's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering. Since the reason stated in the text, "For even the son of a daughter delivers him in the next world, like the son of a son." *Menu*, ix. § 139 is equally applicable, and his father's or grandfather's daughter's son transports his *manes* over the abyss by offering oblations of which he may partake, *Jim. Vahana*, ch. xi. s. vi. § 9.

Accordingly, *Menu* has not separately propounded their right of inheritance, for they are comprehended under the two passages, "To three, must libations of water be made," &c., and "to the nearest kinsman (sapinda) the inheritance next belongs," *Menu*, ix. § 187. *Yajnavalchya* likewise uses the term gentiles or kinsmen (gotraja) for the purpose of indicating the right of inheritance of the father's and grandfather's daughter's son, as springing from the same line in the relative order of the funeral oblation, and for the further purpose of excluding females related as sapindas, since these also spring from the same line, *Jim. Vahana*, ch. xi. s. vi. § 10.

SISTER.—The general principle is that females are incompetent to inherit. The sister, therefore, being no offerer of oblations, is excluded from the heritage. But the right of succession of the widow, and certain others—viz., the daughter, the mother, and the paternal grandmother, is reserved by express texts without any contradiction to this maxim, *Jim. Vahana*, ch. xi. s. vi. § 8, 11, and notes; 3 *Dig.* 528, 529; 1 *Stra. H. L.* 134, 146; 2 *ib.* pp. 239, 243, 244 *C.* and *S.* See *ante*, "Brothers," p. 290.

BOMBAY.—According to the law of inheritance prevailing in Bombay, sisters succeed to the estate of their deceased brother, if the estate had been separately acquired by their father in preference to their father's brother's sons, *Vinayak Anandrow* v. *Luxumeebaee*, 9 *Moore's In. Ap.* 538; 1 *Bomb. H. C. R.* 117. *Bhugwantrao* was a Hindoo resident at Bombay; he died in 1851, having made a will appointing his wife (one of the respondents) his sole executrix, and added, "All the outstanding debts due to me must collect, and, after paying legal debt due by me, and the expense of funeral and other ceremonies during the first year of my death,

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the remainder property, both moveable and immoveable, I give and bequeath to Luxumeebaee, my dearly beloved wife, and my little son Guyanon, an infant." "The joys," &c., I have made for my wife and children; they belong to themselves "respectively." Their Lordships consider that the word "respectively" has no application to the gift of the residue, but refers only to whatever may have been meant by "the joys," &c.

Besides his widow and son, the testator left three daughters after him, who are also respondents. His son died under four years of age. Observations were made concerning the true construction of the words of the gift of the residue, and whether as giving or not giving absolute interest, or an interest in the nature of what English lawyers call a joint tenancy in common. Upon these points no opinion was given, for upon the testator's death the widow and the son took the whole between them, at least in possession, and upon death of the son the widow became entitled to the whole at least for her life.

The appellants contend that upon the death of Guyanon the absolute interest in the whole, or a moiety, subject to the wife's life-interest, devolved upon the appellants as his heirs, and not upon the daughters, as they were the sons of the brother of the testator, and being so related in the male line, they excluded by law the sisters of Guyanon from the heirship to him.

Upon the capacity of the sisters to be heirs of their brother different views of the law appear to be taken in different parts of India, and a general feeling in favour of excluding the sisters in such a case appears to prevail in Bengal, but not in the territories of Bombay. It is a point upon which probably it may be said that a reasonable difference of opinion may be entertained. But the authorities most regarded in Bombay, whence this case comes, seem to be in favour of preferring the claim of the sisters to that of the male paternal relatives, the cousins. The *Chief-Justice Sausse*, in giving his judgment in the present case, quotes a book with which we are not familiar here, but which seems to be well known in Bombay, and to be considered and treated as an authority there. He says, Supposing, then, that Luxumeebaee to take a life-estate only in the descended inheritance, the reversion vests in the next heir of Guyanon, and upon the best authorities recognised in this Presidency that heir is his sisters, who are defendants in the suit.

This appears from the *Mayukha*, ch. iv. p. 19, where, after enumerating the mother, see pp. 14 and 15, the uterine brother and his sons, s. 16, 17, the paternal grandmother, s. 18,—and no paternal grandmother of Guyanon is shown to be in existence, on the face of this bill—the commentator in s. 19 proceeds thus: "In default of her, (the paternal grandmother,) comes the sister under this text of *Menu*. To the nearest sapinda, (male or female,) after him, or her in the third degree the inheritance next

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belongs; and thus of *Brihaspati*, where many claim the inheritance of a childless man, whether they be paternal or maternal relations, or more distant kinsmen, he who is the nearest of them shall take the estate." And the next rank is hers, (the sister's,) both from her being begotten under the brother's family name, and there being no further reservation with respect to the gentile relationship. Neither is she mentioned in the texts as an occasion of taking the wealth, but as next of kin she succeeds.

Considering the high authority of the *Mayukha* on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother. But, according to certain commentators on the *Mitacshara*, the sister comes next in order of inheritance after the brother. The passage in the *Mitacshara* is contained in the first par. of ch. ii. s. iv. On the failure of the father, brethren share the estate. *Nanda Pandita* and *Balam Bhatta*, says *Mr Colebrooke* in his note to this passage, considers that, as including brothers and sisters, in the same manner in which parents have been explained mother and father, and conformably with an express rule of grammar.

They observe that a brother inherits first, and in his default the sisters. This opinion, *Mr Colebrooke* observes, is controverted by *Kamalakara* and the author of the *Mayukha*. It certainly is so in § 16 of ch. iv. viii. of *Mayukha*, p. 105, but it should be observed that at p. 15 of the same commentary the doctrine of *Mitacshara*, now generally regarded as established as to the word "parents," including both father and mother, is controverted, and on precisely the same grammatical grounds.

Their lordships desire not to be understood as expressing an opinion that the general course said to be taken in Bengal upon this subject, or upon the construction of the word brethren is wrong; but neither are they satisfied that the construction put upon the passage in the *Mitacshara*, which has been mentioned, and generally adopted as it seems in Bombay, is wrong. Their lordships come to the conclusion that the general rule in Bombay has long been, and is, to treat the sisters as heirs to the brothers rather than the paternal relatives of the description of the present plaintiffs.*

Their lordships consider that, in Bombay at least, the sisters in such a case as this, are the heirs of the brother. The consequence is, that in whatever possible manner the will of the testator is read, the entire interest in the property in question must be viewed as vested in the widow and her daughters, or some, or one of them.

SISTER'S SON.—In default of brother's grandsons, the sister's son inherits in Bengal, *Jim. Vahana*, ch. xi. s. vi. § 8, 9, but not in the provinces, which follow the *Mitacshara*, 1 *Stra. H. L.* 147; *Rajchunder* v. *Goculchund* 1 *Beng. R.* 46, *ante*, 1805; 1 *Morl. Dig.*

* Query, appellants.

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327; *Doe d. Kullammah* v. *Kuppu Pillai*, 1 *Mad. H. C. R.* 90, affirming *R. A.* No. 33 of 1858; *M. S. D.* 1858, pp. 209, 211 *S. A.* No. 84 of 1860; *M. S. D.* p. 245, 1860. In *Elberling's Treatise on Inheritance*, § 178, &c., it is laid down that sons of different sisters take according to the numbers born, as well as unborn and even unbegotten, at the time of their uncle's death, *Bijia Deby* v. *Unnapoorna Deby*, 1 *S. D. A.* 162; *M. Solookhuna* v. *Ramdolal Pande*, *ib.* 324. *Elberling* is a Bengal writer, but discusses the authorities of the Benares school as well. At the close of § 178, he says, that according to the schools of *Benares* and *Mithila*, the sister's sons are excluded, as they belong to a different family, p. 79.

In the Southern India schools the paternal grandmother is ranked next to the brother's son, and the sister's son also is excluded from the enumerated heirs, *Rajachunder Narrain* v. *Goculchunder Goh.* 1 *S. D. A. R.* 43. The suit was there brought by a sister's son, against the paternal uncle's son, for the recovery of land in Bengal, the estate of a deceased Hindoo. The Court held that, according to *Bengal* law, the plaintiff was heir; according to the *Mithila* law, the defendant, 1 *Macn. P. H. L.* 28; 2 *ib.* 125.

The writers in the Bengal school differ as to the rights of succession between the whole and half blood, some maintaining that an uterine sister's son excludes the son of a sister of the half-blood: but according to the most approved authorities there should be no distinction, 1 *Macn. P. H. L.* 29.

NIECES OR SISTER'S DAUGHTER.—The observations we have made with reference to a sister apply to the claims of nieces, or sister's daughters, who are nowhere enumerated in the order of heirs, although *Nanda Pandita* and *Balaam Bhatta* maintain that daughters also of sisters, have a right of inheritance, an opinion which has been refuted, 2 *Stra. H. L.* 248; 1 *Macn. Prins. H. L.* 29, n. On a question, as to whom does the land of a Hindoo woman descend, she having left her surviving two nieces and a grandson of a third? The pundit answered, As between the grandson of a deceased niece, and the surviving sisters, the grandson succeeds. The two surviving their sister can have no claim, having no issue. It is held in the *Smriti Sindheeva*, in the chap. of *Jim. Vahana*, treating on woman's property, that a female, having no issue, shall never succeed to land; the same is repeated in the *Smriti Chandrika*, *Saraswati Vilasa*, and *Verderajah.* Upon which *Mr Sutherland* remarks, that he regards the opinion as very inaccurate. See the erroneous doctrine, that women inherit only through having male issue, controverted in the *Mitacshara*, ch. ii. s. i. Here the right of the grandson to succeed can only be through his grandmother; therefore he can have no right to a larger share than that to which she would have been entitled. In fact, however, I think he has no right to any share. The doctrine of representation does not apply to the case of succession to the estate of an aunt,

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or great grand-aunt, and the right of his grandmother had never vested. It is worthy of consideration whether either of the three sisters could have any right at all, to succeed to the estate of their deceased aunt. In the series of heirs the niece is nowhere enumerated; and my pundit agrees with me that the estate would escheat rather than descend to nieces, and *à fortiori* to the grandson of a niece, 2 *Stra. H. L.* 239.

SUCCESSION AFTER SISTERS' SONS.—In the Bengal school the succession, after the sister's son, according to *Daya Krama Sangraha*, and 1 *Macn. P. H. L.* 29, passes to the—

Brother's daughter's son.
Paternal grandfather.
„ grandmother.
„ uncle.
„ son.
„ grandson.
„ grandfather's daughter's son.
„ uncle's daughter's son.
„ great-grandfather.
„ „ grandmother.
„ „ grandfather's brother.
„ „ grandfather's son.
„ „ grandfather's grandson.
„ „ great-grandfather's daughter's son.
„ „ „ grandfather's brother's daughter's son.

On failure of the foregoing, the inheritance passes, in the maternal line, to the—

Maternal grandfather.*
„ uncle.
„ son.
„ grandson.
„ daughter's son.
„ great-grandfather.
„ great-grandfather's son.
„ great-grandfather's grandson.
„ great-grandson and daughter's son.
„ great-great-grandfather.
„ great-great-grandfather's son.
„ great-great-grandfather's grandson.
„ great-great-grandfather's great-grandson and daughter's son.

REMOTE KINDRED—SAKULYAS.—In default of all these, the property goes to the remote kindred in the descending and ascending line, as far as the fourteenth in degree, then to the

* *Jagannatha*, 3 *Dig.* 530, says, that "the son of a son's, and of a grandson's daughter, and the son of a brother's, and of a nephew's daughter, and so forth, claim succession in the order of proximity before the maternal grandfather." But this opinion is not supported by any authority.

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Spiritual preceptor.
The pupil.
The fellow-student;* those bearing the same name; those descended from the same patriarch.

Brahmins learned in the vedas, or holy books; and, lastly, the king, by escheat, with the exception of Brahmin's property, which must be distributed among other Brahmins; but see 8 *Moore's In. Ap.* 500, where it has been held that a Brahmin's estate is also liable to escheat. See *post*, p. 302. 1 *Macn. P. H. L.* 30.

Even amongst the Bengal writers this order of succession does not generally prevail. *Srikrishna Tarkalankara*, in his commentary on the *Daya Bhaga*, after the sisters' sons places the paternal uncle of the whole blood, the paternal uncle of the half-blood, the son of the paternal uncle of the whole blood, the son of the paternal uncle of the half-blood, their grandsons successively—

The paternal grandfather's daughter's son.
„ grandfather.
„ grandmother.
„ grandfather's whole brother.
„ „ half-brother.
„ „ their sons and
„ „ grandsons successively.
„ great-grandfather's daughter's son.

The *Sapindas;* the maternal uncle and the rest, who present oblations which the deceased was bound to offer.

The mother's sister's son.

The maternal uncle's sons and grandsons.

The grandson of the son's son, and other descendants for three generations in succession.

The offspring of the paternal grandfather's grandfather, and other ancestors for three generations.

Samanodicas, these connected by obsequial offerings of water.

In the *Vividanavasetu*, a digest compiled by the order of *Mr Hastings*,† *Vivadasararnava* and *Vividabhungarnava*, a digest compiled at the request of *Sir W. Jones* by *Jagannatha*, and usually cited as the Digest, the series of heirs are thus enumerated:—After the sister's sons—

The grandfather.
The grandmother.
The uncle.
The uncle's son.
„ grandson.
„ great-grandson.
Grandfather's daughter's son.
Great-grandfather.

* A fellow-hermit is heir to an anchorite, his pupil to an ascetic, and his preceptor to a professed student of theology, 2 *Stra. H. L.* 248.

† This is considered of doubtful authority.

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Great-grandmother.
" " son.
" " grandson.
" " great-grandson and daughter's son.
Maternal grandfather.
" uncle.
" " his son.
" " grandson.
The deceased's grandson's grandson, (in the male issue.)
His great-grandson and his
Great-great-grandson.
Then the ascending line succeed.
The paternal great-grandfather's father.
" " son, grandson, and great-grandson.

Jagannatha assigns a place next to the maternal uncle's grandson, to the maternal great-grandfather, and the maternal great-great-grandfather and their descendants. He also is of opinion that of the male descendants of the paternal grandfather and great-grandfather, those related by the whole blood should exclude those of the half blood.

All these authorities concur in the order of enumeration, as far as the sister's son. *Mr Colebrooke*, 2 *Stra. H. L.* 261, says, Where there is any difference of opinion, reliance may with safety be placed on the *Daya Krama Sangraha of Srikrishna*, 1 *Macn. P. H. L.* 31.

The works to which we have referred are of the greatest authority in Bengal. Differences of opinion prevail amongst writers of less note, but it is unnecessary to refer to them more particularly, 1 *Macn. P. H. L.* 31.

Spiritual preceptor.—In default of all relatives, property vesting in a male will pass to the acharyar, or spiritual preceptor, the pupil, fellow-student in theology; learned Brahmins; and, lastly, always excepting the property of Brahmins, the estate escheats to the Crown, *Mitac.* ch. ii. s. vii. See *ante*, p. 301. Property vesting in a female, except in the instance of Brahmins' escheats, in default of relatives, *Stra. Man.* § 358.

Property vesting in a Brahmin, whether male or female, on failure of relatives, should go to any learned or venerable priest, and then to any pure Brahmin, *Menu*, *Narada*, *Mitac.* ch. ii. s. vii. § 3–5. The Privy Council, however, have determined that it escheats to the crown as any other property, *Collector of Masulipatam* v. *Cavaly Vencata Narainapah*, 8 *Moore's In. Ap.* 500.

The crown would now therefore undoubtedly claim the property in supersession of the teacher, &c., and their rights; for, such a rule seems to be merely directory, and comes under a principle which our Courts cannot carry out, or adjudicate upon, as being too indefinite in its nature, and incapable of being carried out universally. Even a much clearer rule that the Crown could not take the property of Brahmins has been overruled by the Judicial Committee of the Privy Council on the ground—

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1. That even Hindoo law does not say that the king cannot take the property, but merely says it would be a great sin if he kept it. His duty being to bestow it upon the virtuous Brahmins.

2. Escheats are not governed by Hindoo law, for rights attaching to property are dependent on the religion and law of the person holding it. Property without an owner cannot be governed by the law of the last holders, and there being no other holder the law of the person taking it governs the whole question.

BENARES.—According to the law as prevailing in Benares, in default of the son and son's son and grandson, the widow, (supposing the husband's estate to have been distinct and separate,) succeeds to the property under the limited tenure above specified. But if her husband's estate were joint, and held in co-parcenery, she is only entitled to maintenance, 1 *Macn. P. H. L.* 32.

In default of the widow, the maiden daughter inherits. In her default, the married indigent daughter. In her default, the married wealthy daughter. Then the daughter's son. But the *Vivadachandra*, *Vivadaratnakara*, and the *Vivadachintamani*, authorities which are current in *Mithila*, do not enumerate the daughter's sons amongst the series of heirs, see *post*, p. 304. The mother ranks next in the order of succession. *Balaam Bhatta* gives the inheritance to the father first; so *Nanda Pandita*; so *Apararka*, *Kamalakara*, author of *Vivadatandava*; the authors of the *Smriti Chandrika*, *Madanaratna*, *Vyavahara Mayukha*, *Vivada Chandrika*, *Ratnakara*; and the authorities current in Benares prefer the father, see *ante*, p. 228, 1 *Macn. P. H. L.* 32.

In default of the father, brothers of the whole blood succeed, and in default, those of the half blood. In their default, sons inherit successively.

The paternal grandmother, see *ante*, p. 228.
" grandfather.
Paternal uncle of the whole—of the half blood,—their sons in succession.
Paternal great-grandmother.
" great grandfather.
" son and grandson successively.
" great grandfather's mother.
" " father.
" " brother.
" " brother's son.

SAPINDAS.—In the same order to the seventh degree, which includes only one degree higher in the order of ascent than the heirs above enumerated.

SAMANODICAS.—In default of sapindas, samanodicas succeed. These include the above enumerated heirs in the same order, as far as the fourteenth in degree.*

* The term *Gotraja*, or Gentiles, has been defined to signify sapindas and samanodicas by *Balaam Bhatta*, and in the *Subodhini*, &c.

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In default of the samanodicas, the Bundus or cognates succeed. These kindred are of three descriptions; personal, paternal, and maternal. The personal kindred are the sons of his own father's sister; the sons of his own mother's sisters, and the sons of his own maternal uncle. The paternal kindred are, sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. The maternal kindred are, the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle.* 1 *Macn. P. H. L.* 34.

In default of them the acharya or spiritual preceptor, the pupil, fellow-student in theology, learned Brahmins, and lastly the estate escheats to the crown. 1 *Macn. P. H. L.* 34.

MITHILA.—The order of inheritance in *Mithila* corresponds with the above. In *Gungadutt Jha* v. *Sreenarain*, and *Musst. Leelawutee*, 2 *S. D. A. R.* 11, it was held that, according to the *Mithila* law, claimants of succession, as far as the seventh, (*sapindas*,) and even the fourteenth in descent, (*samanodicas*,) in the male line from a common ancestor, are preferable to the cousin by the mother's side of the deceased proprietor, *i.e.*, his mother's sister's son. Had the case been decided according to the Bengal law, the mother's sister's son would have succeeded, he taking between the *sapindas* and *samanodicas;* for it was there held that the son of a maternal uncle, (who is also a *bandhu*,) takes the inheritance before the lineal descendants from a common ancestor, beyond the third in ascent, *Rschoorun Mohapater* v. *Anund Lal Khan*, 2 *S. D. A.* 35, 1 *Macn. P. H. L.* 35.

BOMBAY.—There is a considerable difference between the above order of inheritance and that current in the west of India. In the *Vyavahara Mayukha*, the heirs after the mother are thus enumerated :—

The brother of the whole blood.

Son.

Paternal grandmother.

Sister.†

The paternal grandfather, and the brother of the half blood who inherit together.

Sapindas.

Samanodicas, and

Bundhus inherit successively according to the degree of proximity. Maternal, or mother's cognate kindred, are the sons of his mother's paternal aunt, of his mother's maternal aunt, and of his mother's maternal uncle, *Mitac.* ch. ii. s. vi. § 1.

* See *Mitac.* In this series no provision appears to be made for the maternal relations in the ascending line; but *Vachespatimisra*, in the *Vivida Chintamani*, assigns to the maternal uncle and the rest a place in the order of succession next to the samanodicas; and *Mitramisra*, in *Viramitrodaya*, expreses his opinion that, as the maternal uncle's son inherits, he himself should be held to have the same right by analogy, 1 *Macn. P. H. L.* 34.

† See 1 *Borr. Bombay Reports*, 71; 2 *ib.* 471. A sister's grandson, 3 *Morris*, 156.

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Spiritual preceptor.—The acharyar, or spiritual preceptor, succeeds them.

Pupil.—Then follow the pupil, the fellow-student in theology, learned Brahmins; and, lastly, the ruling power, which, in this instance, would be the Empress of India.

Southern India.—The order of succession, according to the law of Southern India, does not appear to differ from that current in *Benares*, 1 *Macn. P. H. L.* 35.

Religious order.—Holy mendicants, devotees, hermits, ascetics, student in theology resigning all worldly ties, have their title as heirs to those to whom they are by nature related, and their property is transmissible amongst themselves, *Jim. Vahana*, ch. xi. s. vi. § 35, 36, note; *Mitac.* ch. ii. s. viii.; 3 *Dig.* 546; *Daya Krama Sangraha*, ch. i. s. x. § 35; 1 *Stra. H. L.* 150, 160, 165; 2 *ib.* 248. In Bengal the rights and possessions of the religious order of *sanyasis* or *Gosains* pass to their *chelas* or adopted pupils, *Beng. R.* 1806, pp. 73, 92; *ib.* 1807, p. 144; *ib.* 1810, p. 246; *Bomb. R.* 397; 1 *Stra. H. L.* 150.

Dancing-girl.—The property of a dancing-girl must pass to her female issue first, then to her male, as in the case of other females, *Stra. Man.* § 361. On failure of her issue it will go to the pagoda to which she is attached, *ib.* § 362. *Mr Strange* relies upon the pundits' opinion, but they cite no authorities.

With prostitutes, the tie of kindred being broken, none of their relatives who remain undegraded in caste, whether offspring or other, inherit from them; for this position the proceedings of the Sudr Court of Madras, dated 11th Nov. 1844, and 7 *S. D. A.* 273, are referred to, as authorities. *Mr Strange*, § 363, adds, Their issue after their degradation succeed, but for this no authority is cited. But the latter position appears to be supported by the judgment of the *H. C.* in *Mayna Bai* v. *Uttaram*, 2 *Mad. H. C. R.* 196; 8 *Moore's In. Ap.*, *post*, p. 334, wherein it is ruled that there is no authority against the existence of heritable blood between the woman and her "illegitimate offspring."

Prostitution, its gains recognised.—The trade of prostitution is recognised and legalised by Hindoo law, *Chalakonda Alasani* v *Chalakonda Ratnachalam*, 2 *Mad. H. C. R.* 56.

The learned editor appends the following note to this case:—In *Anundrow Gunpet* v. *Bapoo Gungadhur*, the High Court of Bombay seemed to think that as the legislature discountenanced prostitution by enacting ss. 372, 373 of the *Penal Code*, it was time to withdraw the sanction of the profession of a prostitute, which had been given by the decision in *Tara Munee Dosea* v. *Motee Buneanee*, and in *Morris' Bomb. R.* 1851, p. 137.

"With prostitutes the tie of kindred being broken, none of their relatives who remain undegraded in caste, whether offspring or others, inherit from them. (Pro. of Sudr Court, 11th Nov. 1844, 7 *S. D. A.* 273.) Their issue after their degradation succeed," *Stra. Man.* 363.

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Quære, If this is law, *samhandha* or relationship can only be destroyed by *Ghatasphotana*, Moreover, if it be said that by Hindoo law a woman loses caste by becoming a prostitute, and therefore cannot inherit, Act xxi. of 1860 applies—If then she can inherit, why should not her undegraded relatives inherit from her?

LANDS ENDOWED FOR RELIGIOUS PURPOSES.—These lands although the management of them passes by inheritance, subject to usage, are not heritable as private property, see *Elder Widow of Rajah Chattersim* v. *Younger Widow*, *Beng. R.* 1807, p. 103; *Marain Dass* v. *Bindhasan Dass*, *ib.* 1814, p. 481; 1 *Stra. H. L.* 151; 2 *ib.* 250; *Sir W. Jones; ib.* 369.

WHAT LAW GOVERNS PARTIES WHO MIGRATE FROM ONE DISTRICT TO ANOTHER WHERE A DIFFERENT SCHOOL OF LAW PREVAILS.—Upon a question whether the *Mithila* or *Nuddea* law was to regulate the succession, the test to be applied is the form, and character of the religious rites, and ceremonies, and the usages of the family.

When, therefore, a family of Bengali Soodra Sutgops, had migrated at a remote period from the south-west of Bengal, where the Nuddea law prevailed, to the district of Poornea, where the Mithila law was in force, and had adopted and performed their religious rites and ceremonies according to the law of Mithila, the lords of the Judicial Committee of the Privy Council held, affirming the decree of the Sudr Court, that the Mithila law in such case governed the right of succession, *Rany Pudmavati* v. *Baboo Doolar Sing*, 4 *Moore's In. Ap.* 259. Upon a claim to the inheritance of a zemindary in Midnapore, which had been in possession, for a long period anterior to the institution of the suit of a family of *Gutgop* Brahmins, who had migrated from Bengal to Midnapore, but had retained their laws, and performed their religious ceremonies according to the *Daya Bhaga*, and other authorities in force in Bengal. The lords of the Judicial Committee held, affirming the judgment of the Sudr Court, that the *Daya Bhaga Sastras* must govern the descent, and not the *Mitacshara*, which prevailed in Midnapore, *Rany Srimutty Dibeah* v. *Rany Koond Luta*, 4 *Moore's In. Ap.* 292.

A deed purporting to be a deed of gift of a zemindary was executed to a stranger by the widow of the zemindar last seised, who died without issue. The deed was made with the confirmation of the *Bundhus*, the mother's brother's sons, the heirs, held to be valid by *Daya Bhaga Sastras*, as against a party claiming the succession according to the *Mitacshara*, as being descended in the seventh remove in the male line from the common ancestor, *ib.*

CANARESE LAW—ALIYA SANTANA—DIVISION OF FAMILY PROPERTY.—This term is derived from *Karn Aliya*, son in law; and *Sri Satana*, offspring; see *Chamier's*, "the land assessment, and the landed tenures of *Canara*." *Mangalore*, 1853, pp. 16, 86, where it is stated that the rule was introduced into *Canara* about the beginning of the third century. *Mr Strange* in his *Manual*, § 404, says, In *Canara*

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a similar system (speaking of Malabar law) of inheritance obtains which is termed Aliya Santan. In Malabar, the Brahmins do not follow this rule. In its details the law of Aliya Santan corresponds with that of *Maroomakatayam*, saving that the principle that the inheritance vests in the females in preference to the males is in practice better carried out in Canara, where the management of property vests ordinarily in females, while in Malabar the males commonly administer thereto.

In Canara, females only are recognised as the proprietors of family property, and division cannot be enforced by one of the members of a family governed by the law of Aliya Santan. This system differs only, from that of Malabar, in more consistently carrying out the doctrine that all rights to property are derived from females, per *Mr Holloway, J.*, *Munda Chetti* v. *Timmaju Hensu*, 1 *Mad. H. C. R.* 380.

This suit was brought by a female member of a family, governed by this rule, which prevails in Canara, for a division of the family property, and for the recovery of a moiety claimed by the plaintiff.

The District Munsiff of Mangalore gave judgment in favour of the plaintiff, but disallowed a portion of her claim on the ground that it was self-acquired property of the second defendant.

This judgment was appealed from, and the principal Sadr. Ameen decreed that the plaintiff was entitled to the entire lands claimed; and this decree was also appealed from to the High Court, and it was contended by the defendants (appellants) that the division of family property in Canara, where inheritance is governed by the *Aliya Santan* rule, cannot legally be enforced.

The case was remitted to the Court below to take evidence with reference to the existing custom and usage, and the civil judge replied that the division of family property had been allowed in numerous suits since 1825.

Mr Justice Frere, in delivering judgment in the principal case, said, "It is necessary to remark that the practice of the division of family proporty at the instance of individual members is undoubtedly at direct variance with the ancient law upon the subject." It is admitted that the law book called after *Bhutalapandiya* * constitutes the basis of *Aliya Santan* system which prevails in Canara, and in a portion of this book which is quoted by *Mr Findlay Anderson* in his decree in appeal, No. 82 of 1843, such division is repeatedly prohibited, and in express terms.† It remains,

* The learned editor of the report of the principal case has appended the following note to it. The work attributed to this author, who is said to have lived in the beginning of the era of Salivahana, A D. 78, though printed in Canara, is still untranslated unto English.

† "The eldest child of the eldest sister, be it male or female, is to be yajamana, (manager,) and is to hold the property as such. But it cannot be divided among the family. The remaining members are to act under the authority of such female, or male manager. If a disagreement takes place between the

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therefore, to be considered whether this ancient law, which is in conformity with that of Malabar, has been superseded by any custom or usage which has, by long prescription, or otherwise, acquired the form of law. The learned judge adds, that the question must be decided in the negative; and continues. Of the decrees submitted by the late civil judge, several award division in favour of males, and are thus clearly opposed to the local law as now settled in Canara. In none does the question of compulsory division between the females, who alone are now recognised as the proprietors of the family estate, appear to have been judicially tried and decided. No. 82 of 1843, in which he quotes *Bhutalapandiya*, *Mr Findlay Anderson*, the late experienced judge of Mangalore, has expressed an opinion in favour of such division, but simply on the ground of expediency, for he admits that it is contrary to the intent of the *Aliya Santan* law, and it is important to observe that the question at issue in that case, was not that of division between females, but of the respective rights of a male and female member of the same family, so that the judgment can form no precedent as respects the point now under consideration. After commenting upon and distinguishing the suit, No. 376 of 1833, the learned judge adds, We arrive at the conclusion that the ancient law which prohibits any compulsory division of the family estate in Canara generally, has not been in any way legally abrogated, or superseded.

Holloway, J., said, It has not been disputed, as indeed it could not be, that the compulsory division of the family property is wholly opposed to the authorities upon which *Aliya Santan* system of inheritance rests. It is equally opposed to the principle of that system which vests the property in the females of a family. . . . The only cases cited are those of inferior courts, evidently influenced by their views of expediency in the particular cases before them; and, still more singularly decisions in which, while violating the law, these courts have admitted its existence. . . . The divisibility of family property in Canara, is one of those propositions

sisters, the elder sister is to provide the younger sister with a separate house and its necessary apparatus, retaining the general managership, and performance of ceremonies, but no division of property can be made. To the dignities of chief families held by the manager of the senior branch, the members of his own *Santan* will, on his demise, be entitled to succeed. Those of the junior branch will have no right. If all the members of the senior branch be extinct, then those of the junior will have a right. The husband is not permitted to confer upon his wife any gifts, but the marriage present. If he give one pice (*sic*,) more, then the family may resume it. The father may give whatever self-acquired property he likes, but no ancestral property to his children. This, his private property, may be inherited by his children. On failure of collateral descendants, a female of the same *bulli* must be adopted, males cannot be adopted. From failure of heirs, *Aliya Santan* estates cannot be sold nor transferred to the wife's children. He must adopt a female who is to inherit the property. If a family becomes extinct without such an adoption, the elders of the caste should assemble, and adopt another couple of people from the same lineage, whose offspring then succeeds to the property."

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which fall within the category of law taken for granted, and is found when examined, to have no solid foundation. The evidently moral precept to give women who cannot agree with the rest subsistence out of the house, is not only no authority for this claim to compulsory division, but is a positive authority against it.

Malabar.—In the province of Malabar, among the great body of its inhabitants, a different rule of descent prevails from what exists in other districts of the Presidency, Canara excepted. In these two provinces the descent runs in the female line. A man's sons are not in the line of his heirs, his property goes to his

Sisters.
Sister's sons.
Sister's daughters.
Sister's daughter's sons and daughters.
Mother.
Mother's sisters, their children.
Maternal grandmother.
Her sisters, and their children.

Failing these and their stock, in the same way of descent, it goes, as in the other part of the Presidency, to the man's disciple and fellow student, and then escheats, *Stra. Man. H. L.* § 382.

This rule of descent is termed *Maroomakatayam*, or Nepotism, in the female line. *Mr Strange Manual*, § 383, says, The origin thereof is conceived to be thus :—It is alleged that Parasooramen, the first king of Malabar, introduced Brahmins into the district, and gave them possessions therein ; and to prevent these properties from being split up, decreed that they should vest in the elder brothers, whom alone he permitted to contract marriage. The sons of these were to be accounted as sons for the whole family. The junior members, being without wives, were permitted to consort with females of lower castes ; the offspring of these unions not being legitimate, could not take rank as Brahmins, or inherit from their fathers. Their inheritance was hence made to follow from their mothers. The lower castes fell into the same system of promiscuous intercourse amongst themselves. With them the females, before attaining maturity, go through a form of marriage, the bridegroom not necessarily taking the position of husband. After maturity they may consort with whom they please, and with as many as they please, provided that the connexion be with members of their own, or some higher caste. The offspring succeed to the estate in the mother's family ; it being obvious that parentage cannot be traced out in the line of the male.

Castes following the Maroomakatayam rule are all, except Brahmins and Aka Podwals, a class of pagoda servants, the artisans,—viz., carpenters, brass, black, and gold smiths ; the Cheromars or slave tribe ; the Malayers and the Paniars, with whom the rule of descent is to sons. The Fecars or toddy-drawers, and the Mookwas, or fishermen of North Malabar follow the rule, while those

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to the South observe makatayam or descent to sons. In North Malabar, most of the Moplas, although Mahommedans, follow also the rule of female descent in this respect, having conformed to Hindoo usage in the times of the ascendency of the Hindoos, *ib.* § 384.

UNITED FAMILIES.—The adherents to the female line of descent form united family communities called *Tarawads*. The remotest member is acknowledged as one of the family if living under subordination to its head, and taking part in its religious observances. The senior male, of whatever branch, is the head of the family, and is termed *Karanaven*, the other members being termed *Anandraven*, *ib.* § 385.

SUCCESSION AS KARANAVEN.—The position of karanaven, belongs to the senior relative of the deceased karanaven, and not to the nearest in blood to the deceased. Thus, a mother's sister's daughter's son, being the senior, is preferred to a mother's sister's son. He would be preferred also to a sister's son, who is the nearest in descent, *ib.* § 386. Each member of the tarawad has a right to succeed by seniority to the management of the family property, *Kunigaratu* v. *Arrengaden*, 2 *Mad. H. C. R.* 12.

The right of the eldest member of a Nambudiri family to manage the illom is absolute, and where a junior member has in fact managed it, then this is presumed to have been with the permission of the former, who may, at any time, take up the actual control, *Nambiatan Nambudiri* v. *Nambiatan Nambudiri*, 2 *Mad. H. C. R.* 110.

NO RIGHT TO PARTITION.—The head of the family has entire control over the concerns and property of the family, to which he has to administer for the good of the whole. The unity of the family may not be broken up by any member claiming his share, and forcing on a division, or incurring debt, and charging it on the property, *ib.* 387. The family may, however, by common consent, come to a division amongst themselves, and the courts would uphold it, and would doubtless grant relief where a wrong was inflicted upon an individual member.

But a division cannot be enforced by a co-sharer, nor by a creditor, *ib.* § 388.

THE PRINCIPLE OF PARTITION.—The division would be according to the taveries, or branches of the family; that is, the property would be divided primarily according to the number of the sisters of the common ancestor, these giving rise to the branches, and afterwards among their progeny, *ib.* § 389.

ALIENATION.—The karanaven can alienate all moveable property, ancestral, or self-acquired, at his discretion. But as to immoveable property, whether self-acquired or ancestral, he must have the written assent of the chief anandraven, *ib.* § 390.

The absence of concurrence of an anandraven, living in discord with the karanaven, would not, however, vitiate the act of the karanaven in alienating immoveable property, the rule requiring the

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assent of the anandraven to such alienation implying that the family is an united one, *Stra. Man. H. L.* § 391.

A karanaven may raise money on mortgage for the use of the family without the assent of the anandraven. It is only in making absolute alienation that their concurrence is necessary, *Stra. Man. H. L.* § 392. The signature of the latter is not required to give validity to bonds executed by the karanaven, *ib.* 393.

According to Malabar law a sale of family property is valid when made with the assent, express or implied, of all the members of the tarawad, and when the deed of sale is signed by the karanaven and the senior anandraven, *if, sui juris, Kondi Menon* v. *Srangin-reagatta Ahammada,* 1 *Mad. H. C. R.* 248. Such signature is *primâ facie* evidence of the assent of the family, and the burden of proof of dissent lies on those who allege it, *ib.*

The assent of the anandraven is necessary to a sale of tarawad by a karanaven. The chief anandraven's signature to the instrument of sale is sufficient but not indispensable evidence of such assent, *Kaipreta Ramen* v. *Makkaiyil Mutoren,* 1 *Mad. H. C. R.* 359.

Property assigned for Nayar females—Judgment against karanaven.—Property assigned by males of a Nayar family, for the support of their females, is still family property, and liable as such to be taken in execution to satisfy a judgment against the karanaven, *Parrakel Kondi Menon* v. *Vadakentil Kunni Penna,* 2 *Mad. H. C. R.* 41. Certain maroomakkatayam land had been attached in satisfaction of a decree obtained by the defendant against the plaintiff's deceased karanaven. The suit was brought to cancel the attachment. The plaintiff alleged that the land was her Stridhana, and had been set aside by the males of her tarawad for her support. The defendant contended that the land still belonged to the tarawad, and was therefore liable for the debt of the karanaven. The munsiff dismissed the suit, but on appeal the civil judge reversed his decree. The Court held, that the decision of the civil judge was bad law, as the karanaven could at any time alter the disposition of family property so made. It is clear that it is still family property, and still liable for a judgment binding on the family. Even, however, if the family arrangement amounted to a binding contract between the members of the family, such arrangement could, in no circumstances, have the effect of withdrawing family property from the execution of a decree binding that property.

Charges on property.—Debts to be chargeable on the family property must have been contracted for the use of the family by the karanaven, or other member managing under his sanction. The debts of individual members cannot be charged on the property, *Stra. Man.* § 394, nor one contracted by the head of the family for his own use, *ib.* § 395. The debtor's estimated share in the family property is not liable for individual debts, *Stra. Man.* § 396. The presumption is that a debt contracted by a karanaven was for the use of the family. The presumption would be the

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other way, where the debt was contracted by the anandraven, *ib.* § 396.

A karanaven may be superseded for incompetency, loss of caste, old age, deafness, blindness, dumbness, madness, disgraceful conduct, and dissipation of the family means. When put aside either by the family, or legal process, he is to be replaced by the next senior competent male member, *Stra. Man.* § 398.

SELF-ACQUIRED PROPERTY.—Self-acquired moveable property—*i.e.*, what has been obtained by individual exertion, and without aid from the family funds, belongs exclusively to the acquirer, and may be disposed of by him at his pleasure. Females may hold it, as well as males. On demise, it descends, in the case of males, to their sister's sons, or nearest anandraven ; and in the case of females, to their issue, male and female, *Stra. Man. H. L.* § 399.

By the law of Malabar, all acquisitions of any member of a family, which he has not disposed of in his lifetime, form part of the family property.

The acquirer may, during his lifetime, hold, alienate at once, and encumber his self-acquisitions. A karanaven in possession of the family funds is presumed to have made all acquisitions with them, and for the benefit of the corporate body. But such presumption is not irrebuttable, and his alienation, or charge of such acquisitions made during his lifetime may be valid, *Kallati Kunju Menon* v. *Palat Erracha Menon,* 2 *Mad. H. C. R.* 162.

These suits were brought by the head of a Malabar family to recover land in possession of the son of a former head. The defence set up was, that the land was the self-acquisition of the deceased, and that during his lifetime he had alienated it to the defendants.

The Lower Courts held that the alienation was void, but expressed no opinion upon the questions, whether the property was self-acquired, and if so, whether it was alienated during the lifetime of the acquirer.

*Per curiam** it is unquestionably the law of Malabar, that all acquisitions of any member of a family undisposed of at his death, form part of the family property, that they do not go to the nephews of the acquirer, but fall, as all other property does, to the management of the eldest surviving male.

It is, however, as unquestionable law, that the acquirer is fully entitled to hold, encumber, and dispose, during his lifetime, of his self-acquisitions. That doctrine, of the soundness of which we entertain no doubt whatever, was laid down by this Court in a case, unfortunately not reported, and is unquestionably in accordance with usage ; for, in all the reckless litigation of Malabar, one member of the Court, with the judicial experience of several years, does not remember an instance of a karanaven attempting to get into his own hands the self-acquired property of a junior member.

That a karanaven, who is in possession of the family funds, will

* *Scotland, C.J.,* and *Holloway, J.*

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be supposed to have made all acquisitions with them, and for the benefit of the corporate body, is unquestionable. It is also clear that it lies upon those who assert such self-acquisitions, to make them out by the most satisfactory evidence; so strong is the presumption in the case of a karanaven against self-acquisition.

When once established, however, we are perfectly satisfied that an alienation, charge, or other disposition, to take effect at once, made during his lifetime, will be perfectly valid.

Widowhood.—There is nothing analagous to the case of widowhood, as elsewhere existing. Females, whether in alliance with males or not, reside in their own families, *Stra. Man. H. L.* § 400.

Management by females.—In theory, the property is held to vest in the females only, the males having right of management and claim to support. Practically, the males are co-sharers with the females. In default of males, females succeed to the management of the family property. In some families, the management devolves on them in preference to the males. In such cases, the senior female takes, *ib.* § 401.

Maintenance.—All members of the family, even the remotest, are entitled to maintenance, 1 *Stra. Man. H. L.* § 402. It seems an anandraven's right to maintenance is merely a right to be maintained in the family house, *Kunigaratu* v. *Arrungaden*, 2 *Mad. H. C. R.* 12.

Account from karanaven—Succession to management—Anandraven's right to maintenance.—An individual member of a tarawad, governed by the Maroomakkatayam rule, has no right to an account from the karanaven, *Kunigaratu* v. *Arrungaden*, *supra.*

This suit was brought to recover a certain sum, the balance of the amount due for maintenance, and for the payment in future, by way of maintenance, of a share of the yearly income of the family property, such share to be ascertained by dividing the income into as many equal parts as there are members of the family. The plaintiffs and defendants constituted a tarawad governed by the Maroomakkatayam usage, and of which the first defendant was the karanaven. The principal Sadr Ameen decreed in favour of plaintiffs. This decree was reversed by the civil judge in the following judgment—"The plaint recites that they were members of a family following the rule of nephews, that the property of the family is in the hands of the eldest member, and they ask for a share of the income to be assessed by dividing the whole into equal parts. The plaint contains the usual fallacy, that all the members of the family have equal rights therein. They have equal rights in one particular; each has the right of succeeding to the management as he becomes senior in age. The whole doctrine of a Malabar family is, that they are all to reside in the family house, and be there supported by the head of the family. There never was the slightest pretence for saying, that

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each was entitled to an account; and if the head could not show that he had expended an aliquot portion of the income upon each member, that such member could sue for the balance; yet to this length the plaint and the decree of the Lower Court would lead us. The prayer of the plaint is as inadmissible as a plaint to divide the whole property between the various members would be. . . . I have the very strongest doubts whether it is open to any member of a Malabar family to ask for support out of the family house. On appeal against this decision, it was contended, that an anandraven and his karanaven are respectively in the positions of a *cestui que trust*, and trustee, and the right to call for an account of the trust, is an incident to the beneficial enjoyment. Mr Justice Frere confirmed the decree of the civil judge, observing, The doctrine of trusts had nothing to do with the case, and that the law, as laid down by the civil judge, was in accordance with his own eight years' experience.

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CHAPTER X.

PARTITION.

SECTIONS.

I. THE NATURAL CONDITION OF A HINDOO FAMILY.
II. WHO ARE THE OBJECTS OF PARTITION.
III. MODE OF PARTITION.
IV. PERIOD OF PARTITION.
V. PARTITION AGAINST FATHER'S CONSENT OF ANCESTRAL PROPERTY.
VI. DISTRIBUTION BETWEEN FATHER AND SONS.
VII. AS TO THE RIGHT TO DEMAND PARTITION AMONG CO-HEIRS.
VIII. UPON WHAT PROPERTY PARTITION ATTACHES.
IX. EVIDENCE OF PARTITION.
X. RE-UNION.

SECTION I.

The natural condition of a Hindoo family is that of union—Definition of—Partition may take place where no property—Three modes of disposing of property—1. By partition—2. By alienation—3. By will—In Malabar no one member entitled to division—In Madras any member can call for it—Presumption in joint family that all the property is joint—Yet they need not be joint in all respects—May be total or partial—Need not attach upon the whole of the property—Partial as to number of shares—As to amount—The law of succession follows the nature of the property—Agreement to divide may be enforced by the widow—Partition final—Effects subsequently discovered—Re-distribution by consent—Where inequality caused by fraud—By concealment—Re-union—Condition of co-parcenery destroyed by partition—Status of native Christians—Payment of debts previous to division—Payment or apportionment with consent of creditors—Postponement with consent of creditors—Mode of providing for payment—Debts contracted after division—On initiation of younger brothers—Marriage of daughters.

DEFINITION OF PARTITION OF HERITAGE.—The natural condition of a Hindoo family is that of union. *Narada*, 13, 1, declares, Where a division of the paternal estate is instituted by sons, that becomes a topic of litigation called by the wise partition of heritage, *Mayukha*, ch. iv. s. iii. § 1; *Jimuta Vahana*, ch. i. § 2; *Mitac.*

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ch. i. s. i. § 5. The word "sons," includes (by synecdoche) grandsons and the rest, and in the same way by paternal, (is intended the estate of,) the grandfather and the rest, and this definition of partition of heritage has been declared, *Mayukha*, ch. iv. s. iii. § 1; *Mitac.* ch. i. s. i. § 5, and note 5. Partition is the adjustment of diverse rights regarding the whole, by distributing them on particular portions of the aggregate, *Mitac.* ch. i. s. i. § 4.

Inheritance includes succession to the goods of any relative. —The expressions "paternal," and "by sons," both indicate any relation, for the term "partition of heritage" is used for a division of the goods of any relation by any relatives, *Narada*, 13; 2 *Menu*, ch. ix. § 103; *Jim. Vahana*, ch. i. § 3; *Mitac.* ch. i. s. i. § 5. Partition consists in manifesting [or particularizing by the casting of lots or otherwise] a property which had arisen in lands or chattels, but which extended only to a portion of them, and which was previously unascertained, being unfit for exclusive appropriation, because no evidence of any ground of discrimination existed, *Jim. Vahana*, ch. i. § 8, or partition is a special ascertainment of property, or making of it known, [by reference of a particular share to a particular person,] *ib.* § 9.

Partition, in its most general sense, comprehending, as well the division of the paternal property during the life of the father, as that which usually takes place, at some period or other, among co-heirs, is adjusting, by distribution, the possession of different parties to a pre-existing right, 1 *Stra. H. L.* 176.

The definition holds good in the case even of a single article; the right to which may be shared, as provided by *Vrihaspati; Jim. Vahana*, ch. i. § 10.

Partition may take place even where there is no property. —Even where there is total failure of common property, a partition may also then be made, by the mere declaration, "I am separate from thee." A partition may even be a mere mental distinction. This exposition clearly distinguishes the various qualities term, *Mayukha*, ch. iv. s. iii. See *post*, p. 339.

Three modes of disposing of property.—In Hindoo law there are three modes of disposing of property:—

1. By Partition.
2. By Alienation or gift.
3. By Will.

In Malabar, no *one* member can call for a division, nor an account of the property from the managing member, nor can he claim to live on any particular portion of the property. In fact, in these respects, all obey absolutely the managing member who, however, may be set aside for mismanagement. See *post*, 310.

In Madras any male member within the four degrees of affinity, *i.e.*, the father, son, grandson, or great-grandson can compel a division. See *post*, 327, 328.

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In Bengal the father's consent is necessary, 1 *Macn. P. H. L.* 43. See *post*.

PRESUMPTION IN JOINT FAMILY THAT ALL THE PROPERTY IS JOINT.—The presumption of Hindoo law with respect to a joint undivided family is, that the whole property of the family is joint estate, and the *onus* lies upon a party claiming any portion of such property as his separate estate, to establish that fact, *Gopeekrist Gosain* v. *Gungapersaud Gosain;* 6 *Moore's In. Ap.* 53; *Dhurm Dass Pundey* v. *Mt. Shama Soondri Dibiah,* 3 *ib.* 229, 240; *Luximon Row Sadasew* v. *Mullar Row Bajee;* 2 *Knapp P. C.* 60; *Gour Chunder Rai* v. *Hurrish Chunder Rai;* 4 *Beng. S. D. R.* 164; 1 *Stra. H. L.* 225.

BUT NEED NOT BE JOINT IN ALL RESPECTS.—Yet the law does not require that a joint Hindoo family should be joint in all respects, *Macn. Cons. H. L.* p. 55; *Shivagunga Case;* 9 *Moore's In. Ap.* 539, *ante*, p. 260.

EACH CAN ONLY CLAIM HIS OWN SHARE.—No general division can be compelled by any one member. Each can claim only his own share; but loses all claim to property subsequently obtained. See *post*, 328.

MAY BE TOTAL OR PARTIAL.—A division may be either total or partial, *Rewun Persad* v. *Mt. Radha Beeby,* 4 *Moore's In. Ap.* p. 168.

It may be partial, both as to number of shares and amount of property. See *post.*

IT NEED NOT ATTACH UPON THE WHOLE OF THE PROPERTY.—It is not, therefore, necessary where the partition is general, that it should attach upon the whole of the property; a part only may be distributed, keeping what remains for future division or to descend in the course of inheritance, 1 *Stra. H. L.* 195; *Stra. Man.* § 278; 2 *Dig.* 527. The circumstance of a few articles remaining undivided would be no impeachment of a partition otherwise valid, 2 *Stra. H. L.* 392, *Coleb.*

PRESUMPTION THAT A DIVISION OF THE WHOLE WAS INTENDED.—Where the division is partial, the presumption will always be, that a division of the whole was intended, and so the divided member may sue for his share of the remainder; the whole being regarded as constructively divided already. He, in fact, holds a dual position, being divided as to part, and undivided as to part; but the presumption as to the latter being against him, he must adduce strong proof to show that this part was really undivided. See *post.*

THE LAW OF SUCCESSION FOLLOWS THE NATURE OF THE PROPERTY.—It has been held in the *Shivagunga Case,* 9 *Moore's In. Ap.* 539, on the authority of 1 *Macn. H. L.* 53, that when a residue is left undivided upon partition, what is divided goes as separate property, what is undivided follows the family property, that which remains as it was, devolves on the old line, that which

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has changed and becomes separate devolves in the new line—in other words, the law of succession follows the nature of the property, and the interest in it, *Temmi Reddy* v. *Achama*, 2 *Mad. H. C. R.* 325.

AGREEMENT TO DIVIDE MAY BE ENFORCED BY WIDOW.—An agreement between two heirs to separate, whether partially carried into execution, or not carried into execution at all, may be enforced by action by the widow of a deceased parcener, *Raja Suraneny Lakshmy Venkama Row*, appellant, v. *Venkata Gopalli Narasimha Row Bahadoor*, respondent, 3 *Mad. H. C. R.* 40. See *Temmi Reddy* v. *Achama*, *supra*.

EFFECTS SUBSEQUENTLY DISCOVERED.—And although a division when once made is final, and cannot ordinarily be re-opened, yet, if effects which were not embraced in the division made, be subsequently discovered, they may then be divided—as to which the family is not yet therefore divided, 1 *Stra. H. L.* 231; *Stra. Man. H. L.* § 274. But this, although so treated in the books, cannot be regarded as an exception to the rule of finality of the division.

PARTIES MAY CONSENT TO RE-DISTRIBUTION WHERE ORIGINAL UNEQUAL.—But by consent of the co-heirs, if for any cause not understood at the time, the division may prove to have been unequal, or defective, the shares may be re-distributed, *Stra. Man. H. L.* § 275. As this is effected by the consent of the parties, it can hardly be considered an exception to the rule of the finality of the division. See *post*.

WHERE INEQUALITY CAUSED BY FRAUD.—If indeed the inequality had been brought about by fraud, then the Courts would grant redress. But the fraud must be clearly proved, see 1 *Stra. H. L.* 232; *Stra. Man. H. L.* § 275.

CONCEALMENT OF COMMON STOCK.—And if any of the co-heirs conceal any of the common property with a view of defrauding his co-heirs of their shares therein, upon a division, he forfeits his share, *Mitac.* ch. i. s. ix. 4-12; *Stra. Man. H. L.* § 273.

REUNION.—There may be a reunion and a subsequent partition. But this can only be effected by fathers and sons, brothers and paternal uncles, and nephews; more distant relations, as grandchildren, cousins, &c., may club their resources together, but cannot return to the position of an undivided Hindoo family, *post*, p. 426.

In case of a re-union, after-born sons, and the re-united members, share the property exclusively. See *post*, pp. 228, 230, 329. *Re-union.*

CONDITION OF CO-HEIRSHIP DESTROYED BY PARTITION.—The condition of co-heirship may be destroyed by partition of the joint property, each co-heir taking his appointed share. The effect of such division is to vest the divided share absolutely in each separate member, and in his line after him, *Stra. Man. H. L.* § 244.

STATUS OF NATIVE CHRISTIANS*—THE LAW REGULATING THE SUC-

* Native Christians, and East Indians, are appellations given to two different classes.

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CESSION—THE ESTATE OF A NATIVE CHRISTIAN OF PURE HINDOO BLOOD—MADRAS REGULATIONS, II. OF 1802, S. XVII.; AND III. OF 1802, S. XVI. CL. I.—EFFECT OF CONVERSION TO CHRISTIANITY AS TO SUCCESSION—HINDOO LAW—RIGHTS OF MEMBERS OF UNDIVIDED HINDOO FAMILY—SEVERANCE OF PARTNERSHIP—THE *Lex Loci* ACT, NO. XXI. OF 1850.—The status of native Christians, and the law of succession and inheritance, as administered in the Mofussil, in respect to their rights and properties, were considered by the Privy Council in the case of *Abraham* v. *Abraham*, 9 *Moore's In. Ap.* 195.

The *Madras Regulation* II. of 1802, s. xvii., provides that in cases coming within the jurisdiction of the Zillah Courts, for which no specific rule may exist, the judges are to act according to justice, equity, and good conscience, and the *Madras Regulation* III. of 1802, s. xvi. cl. i. prescribes that in suits before the native Court, regarding succession, inheritance, caste, &c., the Hindoo law, with respect to Hindoos, and the Mahommedan law, with respect to Mahommedans, are to be considered the general rules by which the judges are to form their decisions. Held, that the latter regulations applied to Hindoos and Mahommedans not by birth only, but by religion.

Held also, that in case of succession to the estate of a deceased Hindoo of pure native blood, who had married a European wife, and who professes with his family the Christian religion, and whose ancestors for generations had embraced Christianity, that such a case was within the provisions of *Madras Regulations*, ii. of 1802, s. xvii., and was to be decided by reference to the usages of the class to which the deceased attached himself and the family to which he belonged.

Upon the conversion of a Hindoo to Christianity, the Hindoo law ceases to have any continuing obligatory force upon the convert.

The convert may renounce the old law by which he was bound, as he renounced his old religion, or, if he think fit, he may abide by the old law, notwithstanding he has renounced the old religion. For though the profession of Christianity releases the convert from the trammels of the Hindoo law, yet it does not of necessity involve any change of the rights or relations of the convert in matters in which Christianity has no concern, such as his rights and interests in, and his power over the property. The convert, though not bound as to such matters, either by the Hindoo law or by any other positive law, may, by his course of conduct after his conversion, have shown by what law he intended his rights to be governed. He may do so either by attaching himself to a class which in this respect has adopted and acted upon some particular law, or by having himself observed some particular law, family usage, or custom.

The *Lex Loci* Act xxi. of 1850, does not apply where the parties have ceased to be Hindoos in religion, *ib.*

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A member of an undivided Hindoo family, having become a convert to Christianity, held, that such circumstance amounts by the Hindoo law to a severance of the union.

The appellants were the widow and only surviving child of Matthew Abraham, deceased, and the respondent was his only brother. The brothers were by birth of pure native blood of Hindoo descent. Their ancestors for many generations had embraced Christianity, and were of the class known in India as native Christians. Matthew married a Christian lady of the class known in India as East Indians. In 1823 Matthew established a shop business in Bellary, which was carried on until his death. In 1827 he obtained a contract from Government for the supply of spirits to the troops, and erected a distillery, and held the contract at the time of his death.

In 1832 he took Richardson and the respondent into partnership in the shop business, giving each a third of the profits. In 1837 the partnership was dissolved. Before Matthew's death the respondent married a Christian "East Indian" lady. In 1842 Matthew died, leaving a widow and son, the appellants. After his death the respondent continued to carry on the shop business, and procured a renewal of the Government contract in his own name, and carried on the business of that contract and of the distillery connected with it. The whole of the capital required for carrying on the shop business was supplied by Matthew. The distillery business was carried on by him alone and with his own capital, the respondent, being a clerk at a salary, or agent, or manager. After the death of Matthew, the respondent continued to carry on both businesses with the capital invested in it at the death of Matthew. After allowing the appellant, Daniell, some small share in the profits, the respondent, in 1851, kept him from the shop, and prevented him from receiving any share of the profits thereof. He carried on the business himself, and appropriated the profits to his own use. In 1852 he asserted that he had no accounts to furnish, and was not liable to furnish any account, and claimed the absolute ownership of the distillery and contract. Whereupon proceedings were instituted for the recovery of the property. The suit was heard by the Civil Court of Bellary, and a decree was pronounced, from which the defendants appealed to the Sudr. Court, and that Court took the opinion of the pundits, who thought that the property ought to be equally divided, one half going to the elder brother, the other half to the younger one; that the rights acquired by the sons could not be affected by their ignorance of these rights. The Court, as to the legal rights of the parties, held that they stood as representing two branches of a family governed as to rights in property by Hindoo law, and with equal shares. The Court thought that the plaintiffs were not justified in having recourse to the suit.

From this decree the present appeal was brought, and the first and most important question raised was, By what law the rights

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of the parties ought to be governed? The true question at issue is, not, who was the heir of the late Matthew, but whether he and the respondent formed an undivided family in the sense which these words bear in the Hindoo law, with reference to acquisition, improvement, enjoyment, disposition, and devolution of property?

It is a question of parcenership and not of heirship. Heirship may be governed by the Hindoo law, or by any other law to which the ancestor may be subject; but parcenership understood in the sense in which their lordships here use the term, as expressing the rights and obligations growing out of the *status* of an undivided family, is the creature of and must be governed by the Hindoo law. Considering the case, then, with reference to parcenership, What is the position of a member of a Hindoo family who has become a convert to Christianity? He becomes, as their lordships apprehend, at once severed from the family, and is regarded by them as an out-caste. The tie which bound the family together is, so far as he is concerned, not only loosened but dissolved. The obligations consequent upon, and connected with the tie, must be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must equally be put an end to by a severance which the Hindoo law recognises and creates. Their lordships, therefore, are of opinion that, upon the conversion of a Hindoo to Christianity, the Hindoo law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or if he thinks fit he may abide by the old law, notwithstanding he has renounced the old religion. It appears that neither side contended for the continuing obligatory force of Hindoo law on a convert to Christianity from that persuasion. The customs and usages of families are alone appealed to, with a reference also to the usages of this particular family. A reference which implies that the general custom of a class is not imperatively obligatory on new converts to Christianity.

The conclusion at which their lordships have arrived on this point appears also to be supported by authority, for the opinion expressed as to the Hindoo law by the judge of the Civil Court at Bellary seems to coincide entirely with the opinions of pundits reported in *W. H. Macnaghten's Hindoo Law*, vol. ii. pp. 131, 132. It is there stated that, on the death of an apostate from the Hindoo faith, his heirs, according to Hindoo law, will take all the property which he had at the time of his conversion, and the marginal note states, that the subsequently acquired property would be governed as to its devolution by the law of his new religion. . . . . The pundits, therefore, in their reply naturally connected religion with the rules of descent of property as an adjunct, but the important point which they declare is the separation of the convert from the binding force of Hindoo law as to his subsequent acquisitions.

Such, then, being the state of the case with reference to the

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Hindoo law, we must consider if there be any other law which determines the rights over the property of a Hindoo convert to Christianity.

The *Lex Loci* Act, No. xxi. of 1850, clearly does not apply, the parties having ceased to be Hindoo in religion; and, looking to the regulations, their lordships think, that so far as they prescribe, that the Hindoo law shall be applied to Hindoos, and Mahommedan law to Mahommedans; they must be understood to refer to Hindoos and Mahommedans, not by birth merely, but by religion also. They think, therefore, that this case fell to be decided according to the Regulation (ii. of 1802, s. xvii.) which prescribes that the decision shall be according to equity and good conscience. Applying then this rule to the decision of the case, it seems to their lordships that the course which appears to have been pursued in India in these cases, and to have been adopted in the present case, of referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant to equity and good conscience.

The profession of Christianity releases the convert from the trammels of the Hindoo law; but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over property. The convert, though not bound as to such matters, either by the Hindoo law or by any other positive law, may, by his course of conduct after his conversion, have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom, and nothing can surely be more just than that the rights and interests in his property, and his power over it, should be governed by the law which he has adopted, or the rules which he has observed.

Their lordships consider the decision referred to in the judgment of the *Sadr D. A.* (14th July 1828) in the case of a succession to one of the class of East Indians, to be an instance of a just and proper exercise of the discretion entrusted to these courts. They have, properly speaking, no obligatory law of the *forum* as the Supreme Courts had. The East Indians could not have claimed the English law as of right. But they were a class most nearly resembling the English. They conformed to them in religion, manners, and customs, and the English law as to the succession of moveables was applied by the courts in the Mofussil to the succession of the property of this class.

Such then being their Lordships' opinion as to the law by which they ought to be guided in the decision of this case, it becomes necessary to see how the case stands upon the evidence.

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Their lordships collect from the evidence that the class known in India as "Native Christians," using that term in its wide and extended sense, as embracing all natives converted to Christianity, has subordinate divisions, forming again distinct classes, of which some adhere to the Hindoo customs and usages as to property; others retaining those customs and usages in a modified form; and others again have wholly abandoned them and adopted different rules and laws as to their property.

Of this latter class are the "East Indians," a class well defined in India, the members of which follow in all respects the usages and customs of the English there; and though they cannot claim the exemption from jurisdiction, nor the privilege of a personal law which the British—such is the limited sense of the terms of the jurisdiction of the charters of the Supreme Courts—enjoy, in other respects, in the common bond of union, in religion, customs, and manners, approach the class of British subjects.

Their lordships think that it is to be collected from the evidence that the family from which both the late Matthew and the respondent descended was of that class of native Christians which commonly retains native usages and customs, and they consider it probable, therefore, that had the family possessed property they would, so long as those usages and customs were retained, have enjoyed it in common, according to Hindoo custom. But their lordships are satisfied that the late Matthew and the respondent had no ancestral property, and that the property Matthew had, was acquired by his own unaided exertions, and without the use of any common stock. That from the time of Matthew's marriage his family adhered in all respects to the religion, manners, and habits of East Indians.

After reviewing the evidence and applying it to the law of the case, their lordships continue—

That it is not competent to parties to create as to property any new law to regulate the succession to it, *ab intestato*, their lordships entertain no doubt. But that is not the question on which this case depends. The question is, Whether, when there are different laws as to property applying to different classes, parties ought not to be considered to have adopted the law as to property whether in respect to succession, *ab intestato*, or in other respects of the class to which they belong? In this particular case the question is, Whether the property was bound by the Hindoo law of parcenership?

Matthew acquired the *nucleus* of his property himself. No law imposed any fetter on him as to his mode of dealing with it; no rule as to the use and enjoyment which the ancestors may, if any, voluntarily have imposed upon themselves could be of compulsory obligation on their descendant acquiring his own wealth. If a Hindoo in an undivided family may keep his own sole acquisitions separate, as he undoubtedly may, *à fortiori*, a Christian may do the same. Customs and usages as to dealing

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with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. Custom implies continuance. If a family of converts retained the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they, nor their descendants change things in their very nature variable, as dependent on the changeful inclinations, feelings, and obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject from conscience customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fictio juris* as still the enduring customs of the family? If it be not so, as to the things which belong to the jurisdiction of conscience, is it so as to things of convenience and interest? Surely in things indifferent in themselves the tribunals which have discretion, and have no positive *lex fori* imposed on them, should rather proceed on what actually exists than on what has existed, and in forming their own presumptions have regard rather to a man's own way of life than to that of his predecessors; though race and blood are independent of volition, usage is not.

The law has not prohibited a Christian convert from changing his class. . . . If such change takes place in fact, why should it be regarded as non-existing in law? Their lordships are of opinion that it was competent to Matthew Abraham, though himself, by both origin and actually, in his youth a "native Christian," following the Hindoo laws and customs on matters relating to property, to change his class of Christian, and become of the Christian class to which his wife belonged. His family was managed and lived in all respects as an East Indian family. In such a family the undivided family union in the sense before mentioned is unknown. How, then, can it be imposed on that family, of which Matthew Abraham formed the head, as father? Not by consent, for there was none; not by force of obligatory law, for there was none; not by adoption, for they had not adopted any Hindoo customs; but, on the contrary, had rejected them all. It could only be imposed by passing over the actual family springing from the marriage, and by absorbing all its members in the original family, of which the two brothers were members, by passing over all actual usages, customs, and ways of living, and by supposing, contrary to fact, the prevalence of Hindoo customs which had been deliberately abandoned. Their lordships are of opinion that the undivided family on which the defendant relies did not exist in any sense.

Hindoo writers treat partition under inheritance.—The Hindoo law writers treat partition under the head of Inheritance, to which it bears an affinity, inasmuch as it is founded on a claim of succession, having its origin in birth; although, in the lifetime

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of the father, inchoate and contingent, either upon his consent, or upon the will of the sons. In these cases, the right of the sons becomes absolute as if the father were dead, 1 *Stra. H. L.* 177.

SONS CO-PROPRIETORS WITH FATHER—RIGHT TO MAINTENANCE OUT OF ANCESTRAL PROPERTY.—This contingent right makes the sons in some sense co-proprietors, or in a certain sense co-parceners with the father in the family property, giving them during the life of the father certain claims for support, &c., upon it, that he cannot altogether defeat. But these claims, deriving their right from birth, attach more upon ancestral, than upon self-acquired property of the father. Upon partition the law regulates the distribution of the former, whilst the latter is left more to his discretion, *Jim. Vahana*, ch. ii. § 14, *et seq.; Mitac.* ch. i. s. ii. § 6, s. v. § 3; *Vishnu*, 2 *Dig.* 538; *Nagalinga Mudali* v. *Subbiramaniya Mudali*, 1 *Mad. H. C. R.* 77.

PAYMENT OF DEBTS PREVIOUS TO DIVISION.—Previous to division provision should be made for all charges upon the family property, such as maintenance, family debts, &c., for where partition takes place during the lifetime of the father it must be regarded as a descent of the property. And as debts by the Hindoo law attach upon the property of the debtor, it follows that such property would be liable to the debts of the ancestor into whosesoever hand it would come. The co-sharers amongst whom it would be divided would therefore be liable to the creditors to the extent of their respective shares at least. *Katyayana*, 3 *Dig.* 390, says, "The debts of the father, one incurred by a parcener himself on account of the debts of the father, and one specially his own; debts so incurred, must be examined on a partition with the kinsmen," *on account of the debts of the father* incurred, for the sake of discharging the father's debts; *specially his own* (contracted by other than himself) for the maintenance of his family. The same author says, 3 *Dig.* 389, "A debt contracted by a brother, a paternal uncle, or a mother, for the support (of the family) must be fully discharged by the co-heirs when partition is made," *Mayukha*, ch. iv. s. vi. § 1, 2; 3 *Dig.* 339, 390. See *ante*, p. 77.

PAYMENT, OR APPORTIONMENT WITH CONSENT OF CREDITORS.—From the text of *Narada*, 3, 32, it results that co-heirs making a partition may apportion the debts of their father or other predecessor with the consent of the creditors, or must immediately discharge the debts, for such is the purpose of ordaining a partition of the residue after payment of the debts, *Jim. Vahana*, ch. i. § 48; *Mayukha*, ch. iv. sec. vi. § 2.

POSTPONEMENT WITH CONSENT OF CREDITORS.—A partition should be made by sons of the wealth of their deceased father which remains after discharging his debts, or with the consent of the creditors the partition may take place first, and the debts be afterwards discharged, *Daya Krama Sangraha*, ch. vii. § 26.

Narada declares what remains of the paternal inheritance, over

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and above the father's obligations, and after payment of his debts, may be divided by the brethren, so that their father continue not a debtor. Here, from the expression, "so that the father remain not a debtor," it appears that the debts may be cleared off subsequently to the partition, otherwise it would be unmeaning, *Daya Krama Sangraha, ib.* § 27, 28. A son living with a father is liable for a debt contracted by him for the common concern, where the latter is afflicted with an incurable disease, the same as though he were dead, 1 *Stra. H. L.* 192; 2 *ib.* 277, 326.

MODE OF PROVIDING FOR PAYMENT.—The mode of providing for these liabilities usually adopted is by setting aside a portion solely for the purpose of meeting those charges, and dividing the rest, or by apportioning those charges among the members who have taken their shares. But in this case, as on dissolution of partnership, the consent of the creditors to a separation of liabilities is required to bind them. See *ante*, p. 77.

DEBTS CONTRACTED AFTER DIVISION.—The debts and charges incurred after division bind the members individually who incur them.

So, also, if a father incur debts after a division, his after-born sons will be jointly liable for them, just as in an undivided family.

INITIATION OF YOUNGER BROTHERS AND SISTERS.—On a partition after death of the father, the elder brothers shall, out of the wealth of the father, perform investiture and other ceremonies for those younger brothers and unmarried sisters who have not had those ceremonies performed, *Brihaspati, Mayukha,* ch. iv. s. iv. § 38, 39; see 3 *Dig.* 101; see *ante*, pp. 85, 86; *Charges on Inheritance.*

Uninitiated brothers should be initiated by those for whom the ceremonies have been already completed, *Yajnavalchya,* 2, 125; *Mayukha,* ch. iv. s. iv. § 40; *Mitac.* ch. i. s. vii. § 3, 4, *ante*, p. 86.

MARRIAGE OF DAUGHTERS.—But sisters should be disposed of in marriage, giving them as an allotment the fourth part of a brother's own share, meaning that a fourth part of such share as would be allotted to a son of such class as the sister [happens to be] being given to each sister, [according to her rank they are to be initiated,] *Yajnavalchya,* 2, 125; *Mayukha,* ch. iv. s. iv. § 40; *Mitacshara,* ch. i. s. vii. § 4; 2 *Stra. H. L.* 313, *ante*, pp. 85, 86.

SECTION II.

WHO ARE OBJECTS OF PARTITION.

Inherent right of each co-heir to obtain partition—In Madras male issue may enforce division from their father—One son may claim it—All may sue jointly, though each takes only his own share——The right of after-born sons—Partition postponed until delivery

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of pregnant women—Father must reserve two shares of self-acquired property when wife not past child-bearing—Son born after partition made by father—Several sons so born—Where born after partition—After father's death—Re-union with father lets in the sons to share with after-born sons—Sons born after adoption, where there are no after-born nor united sons—Minors—Division during minority of any son—May claim through guardian if evidence of malversation—Where infant bound by acts of guardian—Guardian may refer the question, whether minor's estate to be divided according to Patni Bhaga or Putra Bhaga—Charge on zemindary by manager or guardian—Re-union of—Evidence of—Whether minor can enter into division, and execute a deed—Illegitimate children—Of Englishman by Hindoo woman, rights governed by Hindoo law—Joint family—Yet partnership differs from joint Hindoo family, defined by that law—On death of each, his lineal heirs entitled to enter partnership—Illegitimate sons do not inherit even moveables—Entitled to maintenance—Sons of a man by a woman of higher class—Illegitimate sons of a Soodra—Failing son, daughter and daughter's son—Failing sons among Soodras, daughters take equal shares—Females—Daughters cannot claim, though when property descends they may divide equally—Partition amongst brothers alters the line of descent—Amongst daughters has not the same effect—No woman can compel division—Where married according to disapproved species—Approved species—Gifts from her own family—From the man, in anticipation of marriage—Woman's fee or gratuity—Where division between father and son—Wife's share—Where she has separate property—Where she must depend upon what husband has received for himself—Where peculiar property has been given to some of the wives—Share of others who are sonless—In Bengal widow not entitled to share undivided estate with brethren of her husband—But she may demand partition, although her share go to her husband's heirs—Otherwise in Benares—Mother shares equally with sons—In Bombay a dowerless mother shall participate with sons—Where more than one—Widows.

Inherent right of each heir to obtain partition.—It is an inherent right in each co-heir, by the Hindoo law, to obtain a partition, *Jim. Vahana*, ch. iii. s. i. § 16.

Sons are the immediate objects of partition by the father. "Sons" embrace, as we have seen, male offspring as far as great-grandsons who, on partition as well as inheritance, share *jure representationis*, 3 *Dig*. 7, 63, 65; *Daya Krama Sangraha*, ch. i. s. i. § 3; 1 *Stra. H. L.* 188.

In Madras male issue may enforce division from the father.—In Madras any male member, within the four degrees of affinity—viz., the father, son, grandson, or great-grandson, may compel a division of ancestral property, *Nagalinga Mudali* v. *Subbiramaniya Mudali*, 1 *Mad. H. C. R.* 77.

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One son may claim it.—So one son may claim it, the rest preferring to remain in union, 1 *Stra. H. L.* 193, 194. All may jointly sue for their respective shares, though in enforcing division from the father, each may claim for himself alone, *Stra. Man. H. L.* § 256.

The right of after-born sons.—In the distribution of property, the law chiefly regards the interest of the sons, and takes especial care that none of them are excluded from participation, whether they be already in existence, or come subsequently into existence by after-birth, the law making special provision for such a case, although different opinions prevail, as to whether the share of such sons is to be supplied by the father out of his share, or by the brothers out of theirs. *Mr Strange, Man. H. L.* § 258, lays it down, that in *any* case they are always a charge on the father only; but *Sir Thomas Strange*, 1 *H. L.* 182, adopts a more reasonable rule. If the pregnancy be apparent at the time, it has been said that the division should be postponed, or the share set apart to abide the event. But should the pregnancy be unknown, and therefore not anticipated, and a son, who was in the womb *at the time* be born after, he should obtain his share from the brothers by contributions, just, in fact, as if he had been born. Should, however, a son be *subsequently begotten*, he must be provided for out of the remainder of the father's property, succeeding to the whole exclusively, or dividing it with such of the brothers, as may have become re-united to the common parent, any acquisition by a re-united parent, through his own industry, or individual wealth, belonging exclusively to the son born after partition, and not to him in common with another re-united; and on failure of after-born issue, the sons who had already received their shares take by inheritance what their parents leave, 1 *Stra. H. L.* 183, citing *Mitac.* ch. i. s. iv. § 16.

Partition postponed until delivery of pregnant women.—Partition amongst brothers must be postponed until after the delivery of such of the women as are childless but pregnant, *Vashishtha, Mayukha*, ch. iv. s. iv. § 37. See *Mitac.* ch. i. sec. vi.; *Jim. Vahana*, ch. vii.

A father must reserve two shares of self-acquired property for himself when his wife is not past child-bearing.—In a case cited by *Macnaghten*, 2 *Prins. H. L.* 145, the question is asked, Can a person divide his self-acquired landed property between his two sons by his senior wife, reserving something for his own maintenance, while his junior wife is pregnant, or while there is a probability of such wife bearing children? And the reply given is, That he is incompetent, without reserving two shares of his wealth, to divide his self-acquisitions, whether real or personal, between his two sons by his elder wife, while his junior wife is pregnant, or while there is a possibility of such wife's bearing children; for "who acts otherwise than the law permits has no

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power in the distribution of the estate." "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support, and the dissipation of their hereditary maintenance is censured." "If the sons were separated from the father (while his wife was pregnant) but not known to be so, the son who is afterwards (born of that pregnancy) shall receive his share from his brother."

2 *Macn. Prins. H. L.* 146, n. says, It should not be supposed that, according to Bengal law, there is a fixed period for a father's distribution of his own acquired property of whatever description. Having exclusive control over his own acquisitions, he may distribute them in greater, less, or equal shares to his sons, and may reserve to himself whatever he chooses, whether half or two shares, or three. His choice alone determines the time of making partition of his own acquired wealth, and the distribution does not operate to debar a male child born subsequently thereto, for his right still subsists over the paternal estate, as appears from the following passage of the *Daya Bhaga;* "If a father, having separated his sons, and having reserved for himself a share according to law, die without being re-united with his sons, then a son who is born after the partition shall alone take the father's wealth; and that only shall be his allotment. But if the father die after re-uniting himself with some of his sons, that son shall receive his share from the re-united co-heirs. If the sons were separated (from the father) while his wife was pregnant, but not known to be so, the son who is afterwards born (of that pregnancy) shall receive his share from his brothers. Not one only, but even many sons begotten after a partition, shall take exclusively the paternal wealth. All the wealth which is acquired by the father himself, who has made a partition with his sons, goes to the son begotten by him after the partition." Under the term "all," wealth, however considerable, which is acquired by the father, goes to the son begotten by him after partition. "But the followers of the Benares school maintain that the father is subject to the control of his sons, in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predecessor. And in conformity to such opinion it may be held that a father is incompetent to distribute his self-acquired landed estate, until his wife is past child-bearing, though that is not distinctly stated in the *Mitacshara* in the chapter treating of the right of one born after partition."

Son born after partition made by father.—If a son is born after partition made by a father, he will be sole heir to the property retained by the father. If none have been retained, the other sons are bound to contribute to a share out of their portions, 1 *Macn. P. H. L.* p. 47.

Several sons so born.—So if several sons be born after partition made by the father, their portions are also to come from their father's share, *Stra. M. H. L.* § 258, citing *Mitac.* ch. i. s. vi.

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§ 2, which does support him, and he and they succeed to the ex clusion of the divided sons; but if any of these have re-united with the father they will share with him, 1 *Stra. H. L.* 182; *Stra. Man. H. L.* § 259.

After father's death.—*Yajnavalchya* states a distinction at a partition after the father's death, with respect to a son born immediately afterwards by a mother, a stepmother, or brother's wife where pregnancy was uncertain. "When the sons have been separated, one who is [afterwards] born of a woman equal in class shares the distributions." The partition is to be thus effected. Something is to be contributed by all the brothers or others [who had previously shared] each something out of his own share, until the [posthumous son's] share is equal to their own, *Mayukha*, ch. iv. s. iv. § 35; see *Mitac.* ch. i. sec. vi.; *Jim. Vahana*, ch. vii.; 3 *Dig.* 436. Sons with whom the father has made a partition, should give a share to the son born after the distribution, *Vishnu.* See *Jim. Vahana*, ch. vii.; 3 *Dig.* 51, after allowing for subsequent expenses and income, *Yajnavalchya. Mayukha*, ch. iv. s. iv. § 36. See *Mitac.* ch. i. sec. vi.; *Jim. Vahana*, ch. vii.; 3 *Dig.* 436.

"One born [to a man] separated [from his sons] will alone take the father's wealth," *Brihaspati;* see *Mitac.* ch. i. s. vi. § 6; *Jim. Vahana*, ch. vii. § 1, 3; 3 *Dig.* 49, 435, "All the wealth which is acquired by the father himself, who has made a partition with his sons, goes to the sons begotten by him after the partition; those born before it are declared to have no right," *Mayukha*, ch. iv. s. iv. § 33; see *Jim. Vahana, supra.* "As in the wealth so in the debts likewise, and in gifts, pledges, and purchases." "They have no claims on each other except for acts of mourning and libations of water." If there be nothing but debts, then that [son] is not even bound to pay those debts, without receiving a share from those formerly separated, for, as is afterwards shown, "he who takes the estate must be made to pay the debts for it," *Mayukha*, ch. iv. s. iv. § 33; ch. v. s. iv. § 16.

Re-union with the father lets in the sons to share with after-born son.—A son born after a division shall alone take the paternal wealth, or he shall participate with such of the brethren as are re-united with the father, *Menu*, ch. ix. § 216; *Mitac.* ch. i. sec. vi.; *Jim. Vahana*, ch. vii. § 1.

Sons born after adoption.—Where a son has been adopted, and there are other sons born after the adoption, the adopted son is entitled to but one-fourth of what forms the share of each of the after-born sons, *Elberling*, 71; *Stra. Man. H. L.* § 252.

Where no after-born nor united sons.—Where there are no after-born sons, nor sons still remaining in union, the divided sons inherit the father's share. See 1 *Stra. H. L.* 183; *Stra. Man. H. L.* § 260.

Minors.—If necessary a division may be made during the minority of any son, and his share should be securely set apart with

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the approbation of the guardian, or of the representative of the sovereign, 2 *Stra. H. L.* 362, *Coleb.* But if this should be neglected, he must, within a reasonable time after attaining his majority, object, and demand his fair share. If not, he will be barred of his remedy after the lapse of the statutory period, or after acts on his part of positive ratification, or tacit acquiescence. But mere silence does not prove ratification, or acquiescence, as the Sadr Court, Dec. 1852, p. 107, seems to have thought. There must be something done under these circumstances, showing,

1. A full knowledge of his rights.
2. An abandonment of them.

MAY CLAIM THROUGH GUARDIAN IF EVIDENCE OF MALVERSATION. —A minor of himself cannot claim a division, but may do so through his guardian, and this only in case there is a reasonable ground to fear that his interests are in danger. There must be evidence of such malversation as will endanger the minor's interests if his share be not separately secured, *Svámiyár Pillai* v. *Chokkalingam Pillai*, 1 *Mad. H. C. R.* 105. It may be a question to what particular share a minor may be entitled, but this being raised, alone affords no warrant for claiming a partition in his name. When he comes of age he will himself claim what may be his due. In the meantime there can be no valid objection to the property remaining in its normal state of joint inheritance, *ib.* See *Alimelammal* v. *Arunachellam Pillai*, 3 *Mad. H. C. R.* 69.

His guardian, or, if he have none, any relation not interested, may institute a suit for the purpose. His share being separated, must be secured for him until he attains his age; otherwise, as against him, a partition would be void. *Mr Colebrooke* says: "The sovereign, or his representative, as guardian of the minor, is competent to authorise a partition. . . . . . Nothing has been found in the law to prohibit the demand of a partition for the benefit of a minor," 3 *Dig.* p. 544, text, ccccliii. 2; 2 *Stra. H. L.* 362. In another case he says, "It does not appear that the original partition would have been void if the due allotment for the minor had been securely set apart with the approbation of his guardian, or of the representative of the sovereign. In the case as set forth, the share stated to have been set apart for the minor in the hands of the defendants, was never delivered to him by them, nor had the partition been ratified for him by his guardian," 2 *Stra. H. L.* 361.

A division of property took place in 1837 between A., the mother and guardian of the plaintiff, a minor, and B., the husband of two childless widows, the defendants, in a suit to recover possession of the property, on the ground that the division did not bind the plaintiff:—The Court held that there being no proof of fraud, or that undue advantage had been taken of the plaintiff's minority, and in the absence of proof of gross inequality in the distribution of the property, the division was valid and bind-

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ing on the plaintiff, *Nallappa Reddi* v. *Balammal*, 2 *Mad. H. C. R.* 182.

WHERE INFANT BOUND BY ACTS OF GUARDIAN.—All acts of the guardian of a Hindoo infant, which are such as the infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by his guardian. Such a guardian may bind his ward by referring to a panchayat of their caste a question of customary partition, *Temmakal* v. *Subbammal*, 2 *Mad. H. C. R.* 47.

GUARDIAN MAY REFER QUESTION WHETHER DIVISION SHOULD BE ACCORDING TO PATNI BHAGA OR PUTRA BHAGA.—Where a Soodra died leaving two widows—one with an only son, an infant, and the other with two sons—held, that the guardian of the infant might refer the question, Whether the deceased's estate should be divided according to the *Patni Bhaga*, (division according to wives,) or *Putra Bhaga* (division according to sons)? *ib.*

This suit was brought by the respondent, the senior widow of Karuppan Chetti, and the mother and guardian of Santi Virana, a minor, her only son, by Karuppan, for the value of one moiety of her deceased husband's lands, against the appellant, the junior widow and mother of the two sons of the deceased, who had taken possession of his property.

All the parties were Soodras.

The appellant contended that, as she had two sons, and the respondent but one, the appellant was entitled, under Hindoo law, to two-thirds, and the plaintiff to one-third only. The widows agreed to abide by the decision of a panchayat (arbitrator) of their own caste; and they and the minor executed a kararnama, or submission, to that effect. The panchayat was held, and the award directed that the property should be equally divided, "in such manner as to maintain virtue and avoid sin." The appellant refused to give effect to the award. The appellant's son, a boy sixteen* years of age, being in Court, was informed of the nature of the suit, and asked whether he would abide by the consequences of his mother's act in suing? he replied that he would be bound by the decision that should be finally passed; and the appellant was held entitled to a moiety of the real and personal property. This decree having been appealed from, it was contended that the minor could not be bound by his consent to the panchayat, or the award, or any act of his mother, *Cavendish* v. *Anon.*, 1 *Cases in Ch.* 279; and, by Hindoo law, a minor can legally have no will, *Sutherland's Dattaka Mimansa Synopsis*, 235, note viii.

The Court, in delivering judgment, said, The first objection taken at the hearing was, that the guardian could not consent to the arbitration on behalf of the minor. We then said, that all acts

* Minority ceases at the age of sixteen, *Stra. Man. H. L.* 123. See Minority.

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of the guardian which were such as the infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by his guardian. In a case of this kind, in which, as the authorities in 2 *Stra. H. L.* 351, 357, show there is the greatest conflict of opinion, it appears to us that no more reasonably and plainly beneficial course could be adopted than the reference of this question of customary partition by the person in possession of the property to the members of the caste of the disputants. It has not been attempted on other grounds to dispute the validity of the award; and we are of opinion that it cannot be impeached on the ground of absence of authority.

CHARGE ON ZEMINDARY BY MANAGER OR GUARDIAN OF MINOR.—A bond executed by a Hindoo and guardian of an adopted son during his minority, the object of which was first to pay off a debt due by her deceased husband charged upon the zemindary, and next to discharge certain debts contracted by her in the management of the zemindary, the validity of which was recognised by her adopted son after he became of age, upheld without determining the question raised of the power of a Hindoo widow, as guardian of a minor, to create a charge on the zemindary during the minority of her adopted son, *Chetty Colum Comara Vencatachella Reddyar* v. *Rajah Rungasawmy Streethmunth Jyengar Bahadoor*, 8 *Moore's In. Ap.* 319.

RE-UNION OF MINOR, EVIDENCE OF.—Where a division has taken place between the members of a Hindoo family, one of whom is a minor, and the minor continues to live with the father after the division, and their shares become mixed together, it does not follow that there was a reunion. A reunion from that circumstance is not conclusively established. It is only evidence from which a reunion may be inferred. Passages abound in writings of Hindoo lawyers in which this distinction seems not to have been borne in mind, and the passage quoted from the *Mitacshara* is of that character, *Kuta Bullyviraya* v. *Kuta Chudappavuthamulu*, 2 *Mad. H. C. R.* 235.

WHETHER MINOR CAN ENTER INTO DIVISION AND EXECUTE A DEED.—This case appears to be principally decided upon a deed of release alleged to have been executed by the minor after attaining his majority; but it is doubtful whether the point of Hindoo law raised during the trial has been correctly determined. The father and a grown-up son divided the family property, the adult son receiving his share, and the father retaining his own share as well as the share of his minor son. The question arises, Could the minor son have entered into a division, and execute a deed of division? The father, in ascertaining the share to which the adult parcener was entitled would, of course, be obliged to take into account the amount of property, to which the parceners remaining united would be entitled, and the fact of one parcener insisting on division, and separating his interests, does not necessarily consti-

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tute the parceners who remain united, separated in consequence of the mere circumstance of their shares having been estimated in order to determine the share of the outgoing parceners. Even if a division between the parceners who do not separate can, under these circumstances, be considered to have taken place, the *Mitacshara* shows that a reunion ensued between the father and minor son. At § 2, s. ix. ch. ii., we find the author says, Effects which had been divided, and which are again mixed together, are termed re-united. He to whom such appertain is a re-united parcener; and at § 3 he observes, *Brihaspati* declares, He who being once separated dwells again, through affection, with his father, brother, or paternal uncle, is termed re-united. With such of the brothers as may have become re-united to the common parents any acquisition by a re-united parent, through his own industry or individual wealth, belongs exclusively to the son born after partition, and not to him in common with another re-united; and on failure of after-born issue, the sons who had already received their shares take by inheritance what their parents leave, *Mitac.* ch. i. s. vi. § 16; 1 *Stra. H. L.* 183. See further on the subject, "Minority."

ILLEGITIMATE CHILDREN.—In those cases where illegitimate children would inherit on the death of their father, they will share on partition during his life; if not, they are entitled to maintenance, see p. 97.

ILLEGITIMATE CHILDREN OF ENGLISHMAN BY HINDOO WOMAN—RIGHTS GOVERNED BY HINDOO LAW—JOINT FAMILY—YET PARTNERSHIP DIFFERS FROM JOINT HINDOO FAMILY, DEFINED BY HINDOO LAW—ON DEATH OF EACH, HIS LINEAL HEIRS ENTITLED TO ENTER PARTNERSHIP.—H., an Englishman, had five children by two Madras Hindoo women, one a married one of the Brahmin caste, living apart from her husband. The children were brought up as Hindoos, and lived together as a joint family. H. devised an estate to the children in equal shares. Held, that the children were Hindoos, and their rights were to be governed by that law.

That, being children of a Christian father, by different Hindoo mothers, although constituting themselves co-parceners in the enjoyment of the property, after the manner of a joint Hindoo family, yet that the partnership so constituted differed from the copartnership of a joint Hindoo family, as defined by the Hindoo law, and that at the death of each son, his lineal heir, representing their parent, would be entitled to enter into that partnership.*

A suit having been instituted by one of the children against his brothers for partition of the estate, a razinamah was executed, by which the shares and the amount to be paid to each were ascertained, with provision against alienation by sale, mortgage, lease, or security of any separate share. Held, that each co-sharer

* Query, Whether such a right of inheritance enures to collaterals? *ib.*

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might nevertheless alienate by will, *Myna Boyee* v. *Ootaram Myaram*, 8 *Moore's In. Ap.* 400.*

ILLEGITIMATE SONS DO NOT INHERIT EVEN MOVEABLE WEALTH.—But the son by a Soodra woman, not legally married, does not obtain a share even of the moveable property. "The son of a Brahmin, a Kshetriya, or a Vaisya, by a woman of tho servile class, shall inherit no part of the estate, [unless he be virtuous, nor jointly with other sons unless his mother was lawfully married.] Whatever his father may give him let that be his own," *Menu.* ch. ix. § 155; *Mayukha,* ch. iv. s. iv. § 29; see *Mitac.* ch. viii. § 10, p. 293; *Jim. Vahana,* ch. ix. § 27, p. 149; 3 *Dig.* 136.

HEIRS ENTITLED TO MAINTENANCE.—*Brihaspati* declares this distinction after the father's death: "The virtuous and obedient son, born by a Soodra woman to a man who has no other offspring, should obtain a maintenance, and let kinsmen take the residue of the estate, *Mayukha,* ch. iv. s. iv. § 30; see *Jim. Vahana,* ch. ix. § 27, p. 149; 3 *Dig.* 139. A son by a Soodra woman born unto a man who leaves no [legitimate offspring] shall, if he be strictly obedient like a pupil, receive a provision for his maintenance." *Gautama, a provision for his maintenance,* or as a means of livelihood, *Mayukha,* ch. iv. s. iv. § 30; see 3 *Dig.* 139.

SONS OF A MAN BY A WOMAN OF A HIGHER CLASS.—The same author says, "Sons termed pratiloma† [shall have an allottment] similar to that of the son produced by a woman of the servile class." *Sons termed pratiloma,* meaning those produced by a woman higher than the begetter with respect to class, *Mayukha,* ch. iv. s. iv. § 31.

ILLEGITIMATE SONS OF SOODRAS.—"Even a son begotten by a Soodra, on a female slave, may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of the share," *Yajnavalchya, Mayukha,* ch. iv. s. iv. § 32; *Mitac.* ch. i. s. xii. § 2; *Jim. Vahana,* ch. ix.; 3 *Dig.* 143; *Choice,* the pleasure of the father. From specifying *by a Soodra* it is clear that a son, by a twice-born man on a female slave, does not obtain a share even by the father's choice. Neither after the death of the father will he get the half, nor in the absence of sons, or other [heirs,] will he get the whole. This is the argument of the *Madana Ratna* and others, *Mayukha,* ch. iv. s. iv. § 32; *Mitac.* ch. ii. sec. xii. § 3. But simple maintenance, *Mitac.* ch. ii. sec. xii. § 3.

FAILING SON, DAUGHTERS, ETC., ILLEGITIMATE SONS TAKE FULL SHARES.—Failing son, daughter, and daughter's son, the illegitimate sons come in for full shares in a Soodra's property, but their obtain-

* Where the opinion given by the native law officers is apparently irreconcilable with the opinions of approved text-writers on the Hindoo law, those who give the opinion should be asked to explain that which appears *primâ facie* irreconcilable, so that they may show on what ground an apparent exemption from the general law is inferred; whether a general custom, modifying texts or local usage, family customs, or other exceptional matters? *ib.*

† *Pratiloma* means against the hair.

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ing shares during their father's lifetime depends upon his pleasure, *Mitac.* ch. i. s. xii. § 2.

FAILING SON, DAUGHTER'S SON TAKES EQUAL SHARE.—Among Soodras, failing a putra, the son of a daughter becomes co-heir, *Mitac.* ch. ii. sec. xii. § 1.

DAUGHTERS CANNOT CLAIM.—Daughters can neither claim nor share in division.

THOUGH WHEN PROPERTY DESCENDS THEY MAY DIVIDE EQUALLY. —Daughters can divide property descending to them in equal shares as sons, *Stra. Man. H. L.* § 267, of course, by consent.

PARTITION AMONG BROTHERS ALTERS THE LINE OF DESCENT.— Partition among brothers creates a new line of succession tracing from the deceased brother, *Stra. M. H. L.* § 268.

AMONG DAUGHTERS HAS NOT THE SAME EFFECT.—*F. Macn.*, 55, says, On failure of male issue of a brother who has divided off the right of the female relatives, namely, of the widow or daughters, accrues. Partition among daughters has no such effect, since on the lapse of one co-sharer, if married, her share vests in her own line; if unmarried, in her brother's, *Mitac.* ch. ii. s. xi. § 12, 30.

WOMEN CANNOT COMPEL DIVISION.—No woman can compel a division. A *wife* can only claim maintenance from her husband, but no *share* in the property; and a widow inherits in the case of a divided family, so that no division is necessary. In an undivided family she gets only maintenance, unless she inherits the self-acquired property of her late husband.

WHERE MARRIED, ACCORDING TO APPROVED SPECIES.—That which a woman may have received in gift from her own family returns to the donors, if alive, and her marriage be of a disapproved species. If the donors are dead, it goes to her husband and his kindred. If the marriage be of an approved species it goes to her husband and his kindred, *Stra. Man. H. L.* § 354, citing *Mitac.*, ch. ii. s. xi. § 11, which does not support him, and *Smriti Chandrika*, which does. Gifts made by a man in anticipation of marriage, should the woman die before the marriage takes place, are returned to the intended bridegroom. See *Stridhana.*

WOMAN'S FEE OR GRATUITY.—*Mr Strange*, in his *Manual of H. L.* § 355, says, The woman's fee, or the gratuity given her on her marriage by the bridegroom, for the purchase of household utensils, cattle, &c., as an exception goes to her brothers. For this he cites the *Mayukha*, without reference to the particular part. Chapter iv. s. x. of that work treats of woman's property, and does not support this rule. *Mr Strange* likewise refers to the *Smriti Ckandrika*, which does not support him. But the *Mitacshara*, ch. ii. s. xi. § 14, supports the rule, but says, "to the brothers of the whole blood," a distinction which *Mr Strange* does not notice.

WIFE ENTITLED TO A SHARE.—In the case of equal participation

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between a father and his sons, a share belongs also to the wife, if no separate property had been given to her. *Yajnavalchya* says, 2, 116, "If he make the allotments equal, his wives, to whom no separate property had been given by the husband or father-in-law, must be rendered partakers of like portions;" and he adds, "or if any had been given let him assign the half." *The half*, meaning as much as with what had been before given her as separate property, (stridhana) will make it equal to a son's share. But if her property be [already] more than such share, no share [belongs to her], *Mayukha*, ch. iv. s. iv. § 15; *Mitac*. ch. i. s. ii. § 8, 9; *Daya Krama. Sangraha*, ch. vi. § 22, 23, 24; *Jimuta Vahana*, ch. iii. s. ii. § 31. Where she does not participate, she must depend upon the reservation to be made by her husband for himself and the remaining members of the family, which with reference to property acquired by him, may be to any extent that he may deem expedient, 1 *Stra. H. L.* 189; 3 *Dig.* 30. Where peculiar property has been bestowed on some of the wives, the other wives destitute of male issue must be rendered by the father partakers of wealth to the same amount, *Daya Krama Sangraha*, ch. vi. § 25. But if such property have not been given, then she must be rendered equal sharer with the sons, *i.e.*, where the sons are made equal sharers, *Daya Krama Sangraha*, ch. vi. § 26.

In the case, however, of peculiar property having been given, [to all the wives,] then they will only receive half a share by the rule of analogy observed in the case of a superseded wife who has received peculiar property, and who is entitled to receive only half the gratuity [otherwise] given to a wife on her supersession, *ib.* § 28; *Yajnavalchya*, 2, 149; *Jim. Vahana*, ch. iii. s. ii. § 31. *Chudamani*, *ib.* n. 31.

WIDOW'S RIGHTS IN BENGAL.—*Sir W. H. Macn. P. H. L.* 49, says, At any time after the death, natural or civil, of their parents, the brethren are competent to come to a partition among themselves of the property moveable and immoveable, ancestral and acquired, and according to the law as received in the province of Bengal, the widow is not only entitled to share an undivided estate with the brethren of her husband, but she may require from them a partition of it, although her allotment will devolve upon the heirs of her husband at her decease. See *Bhyroochund Rai* v. *Russookmunee*, 1 *S. D. A. R.* 28; *Neelkaunt Rai* v. *Munee Chowdrain*, *ib.* 58; *Rani Bhawani Dibia* v. *Ranee Soorujmuni*, *ib.* 135.

IN BENARES.—But in the Benares school the reverse of this doctrine prevails. See *Duljeet Singh* v. *Sheomunook Singh*, *ib.* 59.

MOTHER SHARES EQUALLY WITH SONS.—"Let the mother also take an equal share," *Yajnavalchya*. Mothers receive allotments according to the shares of sons, *Vishnu*, *Jim. Vahana*, 64; 3 *Dig.* 15.

In another *Smriti*, it is said, "A mother, if she be dowerless, shall in a partition by sons take an equal share." The meaning

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is, that if she have dower she shall take only as much as with that dower will make her an equal sharer with her sons. But no share belongs to her if her property be more than such share, *Mayukha*, ch. iv. s. iv. § 18.

In a case before the High Court of Bombay, after citing the above passages, *Arnould, J.*, said, This doctrine has been followed by the late Supreme Court in the case of the goods of Chepajuddoo, decided on the 22d of June 1861, a note of which was furnished by the Chief-Justice, where the Court, after consideration, and obtaining answers from the Shastres of the Sudr Adawlut, and at Poona, held that, "If there be more than one widow, each is entitled to an equal share of the property." It appears from these answers, that although the author of the *Mayukha* cites no text in support of his opinion, such texts are to be met with in the *Viramitrodaya*, an authority of the *Benares* school, and *Macn. Prins. of Hindoo Law*, a work of authority in Bengal. It is also said, p. 19, that if there be more than one widow their rights are equal. The case in *Morton's Reports*, p. 314, shows that this rule was acted upon by the Supreme Court as early as the year 1791; and in 1 *Morley's Digest*, (§ 15,) we find an instance of its being acted on in the North-Western Provinces in 1850. On these authorities we hold that the widows in this case are, *primâ facie*, entitled to equal shares of the property, and it remains to be considered whether either of them is disentitled by misconduct to her share; and if not, then whether we ought to grant administration to them jointly, or to one only; and if the latter, to which of them. After asking, Is the elder widow, then, deprived of her right by the misconduct proved? the learned judge proceeds to discuss the questions of infidelity and incontinence, and to point out discrepancies in the authorities on the subject, adding, In Bengal two widows take the whole estate for life, and on the death of one the whole survives to the other, upon whose death it goes to the collateral heirs of the husband, 1 *Morl. Dig.* 313. In Madras it has been held that the eldest widow succeeds, the other widows being entitled during her life to maintenance only, the second widow succeeding on the death of the first, 1 *Mad. Sel. Dec.* 456, 457, *S. R. A.* of No. 11, 835; 2 *ib.* 44. But see *Strange's Man. of H. L.* 2d ed. § 326, where the author lays down that in Southern India the wives are viewed on an equality, and inherit equally, and he considers the following passage from the *Mitacshara*, ch. ii. s. i. § 5, (omitted in *Colebrooke's* translation,) which the editor owes to *Vakeel Crinivasacharya*, "The singular number 'wife' signifies the kind, hence if there are several wives belonging to the same, or different castes, (they) divide the property according to the shares prescribed to them, and take it." In the goods of *Dadoo Mania*, 1st September 1862, *Ind. Jur.* October 25th, 1862, page 59.

Sir Thomas Strange, p. 136, 137, has laid down decidedly, When

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a man has left more widows than one, and no son by any, she who is first married, being the one who is considered as married from a sense of duty, succeeds in the first instance, the other inheriting in their turn as they survive. He quotes as an authority 3 *Dig.* 461, 489, 486. *Mr Strange's Man. H. L.* 326, does not assign any reason for supporting the conclusion that a clause between clauses 5 and 6 in *Colebrooke's* translation of ch. ii. s. i. of the *Mitacshara* has been omitted, and until the authenticity of his assertion be proved we must conclude that *Colebrooke* is correct. In clause 5 *Mr Colebrooke* translates a passage from *Subondini*, which appears to us to support the view of *Sir Thomas Strange.* Clause 6, which should follow the supposed omitted clause, is not in harmony with the existence of such a clause. Neither does any other passage in the whole chapter of the *Mitacshara* support the conclusion that such clause ever existed.

Macn. P. H. L. p. 19, which appears to be the same passage as that referred to in the above quoted judgment of *Sir J. Arnold*, when drawing the distinction between the law current in the Bengal and other schools observes, that if there be more than one widow, their rights are equal; for this position he attests *El. H. L. App.* 59, which has reference to a totally different subject, namely, a claim to maintenance preferred by a wife against her husband. It is singular that *Macnaghten* should have referred to *Sir Thomas Strange's* work as his authority, seeing that it expresses a totally different opinion at pp. 136, 137.

SECTION III.

MODE OF PARTITION.

May take place where no common property—By arbitration—By adjustment, lot, suit—Without writing—Verbal evidence—Among co-heirs—Hindoo instruments, or agreements.

WHERE NO COMMON PROPERTY, PARTITION MAY TAKE PLACE.—Even where there is a total failure of common property, a partition may also then be made by the mere declaration, "I am separate from thee." A partition may be a mere mental distinction. This exposition clearly distinguishes the various qualities of this term, *Mayukha*, ch. iv. s. iii. § 2, *ante*, p. 316.

BY ARBITRATION, BY ADJUSTMENT, BY LOT, BY SUIT.—Partition may be made openly in the presence of arbitrators, or privately by adjustment, or by casting lots, 3 *Dig.* 536, *Sancha* and *Lichita*, 2 *Dig.* 505, 518; *Jim. Vahana* ch. i. § 8, note; 1 *Stra. H. L.* 190.

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If no amicable arrangement can be arrived at, the object may be effected by a suit to enforce division.

WITHOUT WRITING.—A division may be effected without an instrument in writing, *Rewun Persad* v. *Mt. Radda Beeby*, 4 *Moore's In. Ap.* 168. According to Bengal law, a writing is merely used *in memoriam rei*, and a written instrument is not essential to the validity of any disposition of property, 2 *Macn. Prins. H. L.* 147, n., 168, n. Though not necessary, it is proper to execute a deed of partition or release, which is the best evidence of partition. But partition without such an instrument cannot be set aside by any of the co-heirs on that ground, as doubts regarding the fact can be solved by parole evidence, *ib.* 168, n. See *Mantena Rayaparaj* v. *Chekuri Venkataraj*, 1 *Mad. H. C. R.* 100; *Doe d. Rajah Sri Krist* v. *E. In. Co.* 6 *Moore's In. Ap.* 267.

Verbal evidence of partition is as conclusive as though it had been written, *Doe d. Gocoolchunder Mitter* v. *Tarrachurn Mitter*, 1 *Morl. Dig.* 485, § 55.

A memorandum of separation between two brothers, one of whom had neither agreed to, nor signed it, is not binding on him, and on the death of his brother he is entitled to succeed to the whole property, to the exclusion of the deceased brother's widow; she is entitled, however, to maintenance, *Gopal Rao Pandoorung* v. *Ruma Baee*, 2 *Borr.* 625; 1 *Morl. Dig.* 485, § 51.

AMONG CO-HEIRS.—As on partition by the father, *ante*, p. 339, so here by the co-heirs partition may take place by arbitration, adjustment, or lot, or by suit in court. Although it is not made indispensable, yet the law prescribes a written instrument, and it is always better to have it. *Brihaspati* says that a record of partition which brothers [or other co-heirs] execute after making a just division by mutual consent, is called the written memorial of the distribution, *Mayukha*, ch. ii. s. i. § 2.

Sir Thos. Strange, 1 *H. L.* 222, in terms eulogistic of the instruments and agreements of Hindoos, says, They are models in their way. Penned in general by the village accountants, (*conocopolies*,) while they express everything that is material, they do so with a compactness and precision not easily surpassed. A regular instrument of partition being entitled according to its purport, the things distributed by it are specified by name, and may be inventoried on the back, the amount being noted also in figures to preclude any fraudulent insertion subsequent. But they are considered to be best enumerated in the body, and this, so as to show what each has received, that the fairness of the division may appear. With the date the names of the parceners are inserted, designated by those of their father's, the same names among Hindoos being usually common to many, for which reason the paternal names of the drawer of the instrument, and of the witnesses to it, are added. Where it is holograph, [or wholly written by the hand of the writer,] there is the less necessity

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for witnesses, but they are in all cases recommended, *Vrihaspati*, 3 *Dig.* 408; *Yajnavalchya*, 1 *ib.* 23. The greatest credit attaches to such an instrument, executed in the presence of, and attested by the rajah and his officers, 3 *Dig.* 416, by which is to be understood simply a public authenticated attestation. What the law expects in general is, that it should be attested by kinsmen; the want of whom, however, and the consequent substitution of more distant relations, or even of neighbours, is always open to be explained, 3 *Dig.* 414. Such, in fact, is the order in which witnesses for this purpose are classed; *kinsmen* being described as persons allied by community of funeral oblations, or as sprung from the same race; *relations*, as maternal uncles; and other collateral and distant relations of the family, 1 *Stra. H. L.* 222, 223.

Section IV.

Period of Partition.

Conflicting opinion of different schools—In Bombay three periods at which partition takes place—(1.) *After the death of the parents*—(2.) *During the joint lives, if the mother be past child-bearing*—(3.) *With the father's consent at any time—Circumstances justifying partition without father's consent—Where father incapable, partition with consent of eldest son—This opinion refuted—In Bengal two periods of division*—(1.) *When father's property ceases*—(2.) *By his choice when the right of property endures—In Madras four periods*—(1.) *By father's desire*—(2.) *On retirement from worldly affairs*—(3.) *Demise of the father*—(4.) *When addicted to vice, is old, disturbed in intellect, diseased—Enumeration by Colebrooke—In Bengal the right to partition is at the father's instance, except in case of civil death or degradation—Act* xxi. *of* 1840—*Menu does not support the doctrine of compulsory division—Refers only to recovery of lost ancestral property—The father cannot make partition of his ancestral immoveable property, unless the mother is past child-bearing—In that case his sons may enforce it—His own consent requisite with regard to self-acquisitions—In Benares the rule is different—Reference by Narada of disposal of sisters does not imply a distinct period—The doctrine of the cessation of the mother to bear children not generally adopted—In Bengal the volition of the father and the mother's incapacity must co-exist—Provision for after-born sons—The rule as to the wife being past child-bearing refers to any wife—The vice and disease must be such as produce degradation from caste—Age, impairment of mind, and bodily disease are not causes of partition, but merely of appointment of son as manager—His acts bind the family property, but consent of co-sharers necessary to alienation.*

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CONFLICTING OPINIONS IN DIFFERENT SCHOOLS.—There have been very conflicting opinions expressed upon this branch of our inquiry, by different writers in the several schools, who assign various periods for the attaching of the son's claim to partition. One of these was the death of the father. As we have treated of the descent of property on the natural demise of the father, under the head of Inheritance, it more properly coming under that division, it is of course excluded to a certain extent from our consideration here. We say to a certain extent; for, as almost all writers on Hindoo law include it, either expressly or impliedly under the head of partition, we must necessarily, in referring to their opinions, follow their example. *Viramitrodaya, Mitac.* ch. i. s. ii. § 7, note, says, But in the case of his (the father's) demise, the successor's own choice is of course the reason (of partition.)

ACCORDING TO THE BOMBAY SCHOOL THERE ARE THREE PERIODS AT WHICH PARTITION OF ANCESTRAL ESTATE TAKES PLACE AFTER DEATH OF PARENTS.—1. "After the [death of the] father and mother, the brothers being assembled, must divide equally the *paternal* [and *maternal*] estate; but they have no power over it while their parents live, [unless the father choose to distribute it,"] *Menu.* ch. ix. § 104. By inserting the word "*and*" the consummation of [both their] deaths is not required. Even thus, in the *Madana Ratna* and *Smriti Samgraha,* "a partition of the father's wealth may take place even while the mother lives, for this reason, that without her husband the mother does not, from her independence, also derive ownership. A partition of the mother's wealth may also take place in like manner while the father is alive; for if there be issue, the lord of the wife is not lord of the wife's wealth, *Mayukha,* ch. iv. s. iv. § 1.

DURING JOINT LIVES, IF THE MOTHER BE PAST CHILD-BEARING.—2. This is opposed to the text of *Brahaspati,* "On the demise of both parents, participation among brothers is allowed, and even while they are both living it is right, if the mother be past child-bearing." So *Narada,* "Let sons regularly divide the wealth when the father is dead, or when the mother is past child-bearing, and the sisters are married, or when the father's sensual passions are extinguished," *Mayukha,* ch. iv. s. iv. § 2.

In partition, however, of the mother's property, by sons, the assumption of course is, that there are no daughters, as these would take first, *Mitac.* ch. i. s. iii. § 8; *Yajnvalchya,* 2, 118; *Jim. Vahana,* ch. iii. s. i. § 4, 5.

3. OR WITH THE FATHER'S CONSENT AT ANY TIME.—3. *Gautama,* "After the demise of the father, let sons share his estate, or while he lives, if the mother be past child-bearing, if he desire partition. From this expression, *if he desire,* partition is declared legal also before the mother is past child-bearing by the father's wish alone,* *Mayukha,* ch. iv. s. iv. § 3.

* The following note is appended:—"5. *Colebroke, Mitac.* 260, But I have here followed the translation given in *Jim. Vahana,* p. 24, as more conform-

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Circumstances justifying partition without father's consent.—*Narada*, "A father who is afflicted with disease, or influenced by wrath, or whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has no power in the distribution of the estate." *Harita*, "If the father be free from desire, old, perverted in mind, or long afflicted with disease, partition of his wealth [may be made."] *Free from desire*, according to the *Madana Ratna*, means without desire of partition. *Perverted in mind*, following practices contrary to law. "The sense is, that partition may be made even against the will of [such a] father," *Mayukha*, ch. iv. s. iv. § 6.

Where father incapable, partition with consent of eldest son.—*Harita** says, that when the father is incapable, partition takes place by the concurrence of the eldest son. But if he be decayed, remotely absent, or afflicted with disease, let the eldest son manage the affairs as he pleases. So *Sankha* and *Likhita*, "If the father be incapable, let the eldest son manage the affairs of the family, or, with his consent, the next brother conversant with business," *Mayukha*, ch. iv. s. iv. § 7.

This opinion refuted.—*Jim. Vahana* says, The alleged power of sons to make partition when the father is incapable of business [by reason of extreme age, &c.,] has been asserted through ignorance of express passages of law [to the contrary]. Thus *Harita* says, "While the father lives sons have no independent power with regard to receipt, expenditure, and bailment of wealth. But if he be decayed, remotely absent, or afflicted with disease, let the eldest son manage the affairs as he pleases. So *Sankha* and *Likhita* explicitly declare, "If the father be incapable, let the eldest son manage the affairs of the family, or, with his consent a younger brother conversant with business. Partition of the wealth does not take place if the father be not desirous of it; when he is old, or his mental faculties are impaired, or his body is afflicted with a lasting disease, let the oldest like a father protect the goods of the rest, for [the support of] the family is founded on wealth. They are not independent while they have their father living, nor while the mother survives," ch. i. § 42.

In Bengal two periods of partition.—*Jim. Vahana* says, There are two periods of partition, one when the father's property ceases, the other by his choice while the right of property endures, *Jim. Vahana*, ch. i. § 38, 44, 50; and the author of that work denies the right of the sons to enforce partition in the life of the father against his consent, on the ground that the sons have not ownership while the father is alive, and free from defect, ch. i. § 11, 38. But three periods must not be admitted, *ib.* § 39. The

able to the doctrine of the *Mayukha*, which allows only three periods of partition. The *Mitac.*, on the other hand, asserts four, and in support of this doctrine divides this very text of *Gautama* into three portions.

* *Sankha*, *Stokes*, *H. L.* book 196, n.; *Mitac.* ch. i. s. ii. n.; *ib.* 379.

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author here opposes the doctrine maintained in the *Mitacshara*, as is remarked by the commentators, *Achyuta*, *Srikrishna*, and *Mahesvara*, *ib.*

In Madras are four periods.—The *Mitacshara*, ch. i. s. ii. § 7, mentions four periods.*

1. By the father's desire.—One period of partition is when the father desires separation—"When the father makes a partition," *Gautama*, 28, 2, *Mitac. supra.*

2. On his retiring from worldly affairs.—Another period is while the father lives, but is indifferent to wealth and disinclined to pleasure, and the mother is incapable of bearing more sons, at which time a partition is admissible, at the option of sons, against the father's wish, as is shown by *Narada*, 13, 2, 3, who premises partition subsequent to the demise of both parents. "Let sons regularly divide the wealth when the father is dead;" and adds, "or when the mother is past child-bearing, and the sisters are married, or when the father's sensual passions are extinguished." Here the words, "Let sons regularly divide the wealth," are understood, *Mitac. supra.* See *post*, p. 347.

3. Demise of the father.—*Gautama*, 28, 1, likewise having said, "After the demise of the father, let sons share his estates," states a second period, "or when the mother is past child-bearing," and a third, "while the father lives, if he desire separation," *ib.*

4. When the father is addicted to vice, is old, disturbed in intellect, diseased.—So while the mother is capable of bearing more issue, a partition is admissible by the choice of the sons, though the father be unwilling, if he be addicted to vice or afflicted with a lasting disease. *Sankha*† declares, "Partition of inheritance takes place without the father's wish, if he be old, disturbed in intellect, or diseased," *ib.*

Enumeration by Colebrooke.—*Colebrooke's Annotations*, *ib.* There are four periods of partition. One while the father lives, if he desire partition; another is when the mother ceases to be capable of bearing issue, and the father is not desirous of sexual intercourse, and is indifferent to wealth, if his sons then require partition, though he do not wish it. Again, another period is while the mother is yet capable of bearing issue, and the father, though not consenting to partition, is old, or addicted to vicious courses, or afflicted with an incurable disease, if the sons then desire partition. The last period is after the decease of the father, *Visvesvara*, in the *Madana Parijata*, *ib.*

There are four periods of partition in the case of wealth acquired by the father, *Visvesvara* in the *Subodhini*, *ib.*

Four periods of partition amongst sons have been stated by the author, (*Vignyanesvara*,) which are compendiously exhibited in a

* This section refers to the law governing the division of property generally, *Nagalinga Mudali* v. *Subbiramaniya Mudali*, 1 *Mad. H. C. R.* 77.

† Cited as Harita in the *Mayukha*, p. 343.

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twofold division by the contemplative saint, *Yijnavalkya.* Here three cases may occur under that of distribution during the life of the father, viz., with or without his desire for separation; the case of his not desiring it being also two-fold—1st, When the mother has ceased to be capable of bearing children, and the father is disinclined to pleasure, &c.; 2d, When the mother is not incapable of bearing issue, but the father is disqualified by vicious habits, or the like, *Subodhini*, *ib.*

The doctrine of the Eastern writers, *Jim. Vahana*, &c., ch. i. § 44, who maintain that two periods only are admissible, viz., the volition of the father and his demise, and not any third period; and that the text relative to the mother's incapacity for bearing more issue regards the estate of the paternal grandfather, or other ancestor, is refuted, *Balam Bhatta; ib.; Mitac. supra.*

We hold that while the father survives, and is worthy of retaining uncontrolled power, his will alone is the cause of partition. If he be unworthy of such power in consequence of degradation, or of retirement from the world, or the like, the son's will is likewise a cause of partition. But in the case of his demise, the successor's own choice is, of course, the reason. By this mode the periods are three. Else there must be great confusion, in the uncertainty of subject and accident, if many reasons, as extinction of worldly propensities, and so forth, must be established collectively and alternatively. Thus the mention of certain reasons in some texts, and the omission of them in others, are suitable; for the extinction of temporal affections, and the other assigned reasons, indicate the single circumstance of the father's want of uncontrolled power, since it is easy to establish that single foundation of the text, *Viramitrodaya; Mitacshara*, ch. i. s. ii. note to par. 7.

Partition then attaches *with* the father's consent, or *without* it, under the circumstances mentioned, *ib.*

In Bengal the right to partition is at the father's instance except in case of civil death and degradation.—*Sir Thomas Strange*, 1 *H. L.* 179, says, "No Hindoo can, according to the law, as it prevails in the Bengal provinces, under any circumstances, call upon his father to divide his property with him. The father may abdicate in favour of one, or of all, according to the limits imposed upon him by the law, if he thinks proper; but with the exception of two cases, partition amongst the Hindoos in the lifetime of the father, whether of ancestral, or of acquired property, would seem to be at the father's will, not at the option of the sons, *Menu*, ch. ix. § 104; *Sancha and Likhita*, 2 *Dig.* 533, 536; *Narada, Vyasa*, 3 *Dig.* 35; *Gautama*, 2 *Dig.* 535; *Baudhayana*, *ib.* 536; *Jim. Vahana*, ch. ii. § 8; *Mitac.* ch. i. s. ii.; 2 *Stra. H. L.* 319–323; (see *Nagalinga Mudali* v. *Subbiramaniya*, 1 *Mad. H. C. R.* 77, *post*, p. 351.) The excepted cases being that of his civil death *by entering into a religious order*, and that of *degradation*,

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working a forfeiture of civil rights," *Menu*, ch. ix. § 209, and even in these cases it is the law alone that operates, casting upon the sons, by right of birth, the succession by anticipation, 1 *Stra. H. L.* 179. But the British legislature have enacted that this circumstance shall not interfere with an individual's right in property, Act xxi. of 1840.

MENU DOES NOT SUPPORT THE DOCTRINE OF COMPULSORY DIVISION. —*Sir Thomas Strange* says, vol. i. p. 179, " A text of *Menu* (ch. ix. § 209) is referred to as showing that of ancestral property belonging to the father, the sons may at their pleasure exact a division of him, however reluctant; and it is true, [as has been already intimated,] that their claim upon property descended is stronger than upon what has been otherwise acquired. But the inference drawn in the *Mitacshara* is at variance with the current of authorities, including *Menu* himself, whose obvious meaning in the text referred to is simply that ancestral property *recovered* without the use of the patrimony classes upon partition with property *acquired*, not to mention that the text in question is differently rendered in the translation we have of the " Institutes " by *Sir W. Jones*, in which it has nothing to do with partition by the father but regards partition among brothers after his death. Moreover *Jagannatha*, in his digest, virtually negatives the inference deduced from it and other correspondent texts which he examined, concluding that " if it be against the father's inclination partition even of wealth inherited from the grandfather shall not be made." The passage in the *Mitacshara*, ch. i. s. v. § 11, alluded to is :—"*Menu* likewise shows that the father, however reluctant, must divide with his sons at their pleasure the effects acquired by their paternal grandfather, declaring as he does, "If the father recover paternal wealth not recovered by his co-heirs, he shall not, unless willing, share it with his sons, for in fact it is acquired by him." The passage in *Menu*, ch. ix. § 209, is as follows :—" And if a son, by his own efforts, recover *a debt or property unjustly detained* which could not be recovered before *by his father*, he shall not, unless by free will, put it into parcenery with his brethren, since in fact it was acquired by himself;" that if a father recover property which had been acquired by an ancestor, and taken away by a stranger, but not redeemed by the grandfather, he need not himself share it, against his inclination, with his sons any more than he need give up his own acquisitions, *Mitac.* ch. i. s. v. § 11.

HE REFERS ONLY TO THE RECOVERY OF LOST ANCESTRAL PROPERTY. —But the inference is not warranted by the text cited, nor indeed by other authorities. *Menu* does not in this text discuss the division of ancestral property, but simply declares that lost paternal wealth, when recovered by the co-heir, shall be treated as self-acquired property. Moreover, the text in question is differently rendered by *Sir W. Jones*, *Menu*, ch. ix. § 209, where it appears to

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refer to partition among brothers after the father's death, and *Jagannatha*, 3 *Dig.* 45, opposes the inference drawn from it, adding, that if it be against the father's inclination, partition even of wealth inherited from the grandfather shall not be made. *Jagannatha*, 3 *Dig.* 47, says, that of patrimony inherited, a partition may be obtained by application to the king in a certain case —viz., if sons be oppressed by a stepmother—but for this he cites no authority; *Macn., Prins. H. L.* 43, confirms this; but *Sir Thos. Strange*, 1 *H. L.* 181, virtually negatives the position.

The father cannot make a partition of his ancestral immoveable property unless the mother is past child-bearing. With regard to his self-acquired estate, consisting of moveable and immoveable property, and ancestral property lost, but recovered by the father, his own consent is alone requisite to partition, 1 *Macn. P. H. L.* 43.

The Benares and other schools differ from the Bengal as to the division of ancestral estate. According to the former, the sons may enforce it, if the mother be past child-bearing, although the father retain his desire for sexual intercourse, or, as it is termed, worldly affections, and he is opposed to partition, *ib.* See *post.*

THE MENTION OF SISTERS HAS REFERENCE TO DISPOSAL IN MARRIAGE.—The mention by *Narada*, 13, 3, *ante*, p. 344, "Of the sisters being married," does not intend a distinct period, but inculcates the necessity of disposing of them in marriage, *Jimuta Vahana*, ch. i. § 47; 3 *Dig.* 52.

THE DOCTRINE OF THE CESSATION OF THE MOTHER TO BEAR CHILDREN IS NOT GENERALLY ADOPTED.—The doctrine with reference to the period when the mother ceases to bear issue, does not appear to be generally adopted, unless it has tended to induce the husband to withdraw from the world, that circumstance alone justifying the claims of the sons, 1 *Stra. H. L.* 181, citing *Jimuta Vahana*, ch. i. § 39, and note, which does not support him.

But though the cessation of child-bearing may not entitle them to a partition without the consent of the father—

IN BENGAL THE VOLITION OF THE FATHER AND THE MOTHER'S INCAPACITY MUST CO-EXIST.—Yet in Bengal it has been held that it cannot take place even *with* his consent, if the mother continues capable of child-bearing, it being necessary that the volition of the father, and the mother's incapacity should co-exist, because afterborn children have by birth a special interest in ancestral property, *Narada*; 2 *Dig.* 113; 3 *ib.* 50; *Jimuta Vahana*, ch. i. § 45; ch. ii. § 1, and note to § 7, 33, 34; *Srikrishna*, note, *ib.* ch. i. § 50; *Daya Krama Sangraha*; *Balam Bhatta*, *Mitac.* ch. i. s. ii. § 7, note; 1 *Stra. H. L.* 182; 2 *ib.* 324, *S.*

PROVISIONS FOR AFTER-BORN SONS.—There is, however, a provi-

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sion made for this contingency, *Menu*, ch. ix. § 216; 3 *Dig.* 501, 434; *Mitac.* ch. i. s. vi. § 16; *Daya Krama Sangraha*, ch. v. § 10, *et seq.*, although there are different opinions as to whether the shares of after-born sons should be supplied by the father, or by the brothers who have received theirs, 1 *Stra. H. L.* 182.

Where the pregnancy is apparent at the time of partition, it should either be postponed or a share set apart to abide the event. But if it were not known, should a son who was at the time in the womb be born afterwards, he should obtain his share from his brothers by contribution, while a subsequently begotten one should have recourse only to the remaining property of the father, succeeding to the whole exclusively, or dividing it with such of the brothers as may have become re-united to the common parent. Any acquisition by a re-united father through means of his individual wealth or personal exertions belonging exclusively to the son born after partition, and to him in common with another re-united, and where there is no after-born issue, the sons who had received their shares take by inheritance what their parents leave, *Mitac.* ch. i. s. vi. § 16; 1 *Stra. H. L.* 183.

THE RULE WITH REGARD TO MOTHER BEING PAST CHILD-BEARING REFERS TO ANY WIFE.—This denotes generally any wife of the father, *Srikrishna.* Since the condition is stated by way of illustration, it intends generally the impossibility of further male issue. If, therefore, it be possible that the father should have issue by another wife, partition should not be made, *Achyuta.* Even then, when the father's wife is incapable of bearing issue, partition is by the father's choice, *Srikrishna*, note to *Jim. Vahana*, ch. i. § 45, so, the postponement of partition is admissible lest sons born after his retirement, if his passions be not extinguished, and his wife accompany him to the wilderness under the option allowed by the law, ("if she choose to attend him,") *Menu*, ch. vi. § 3, should be thus deprived of a maintenance. But if he retire to the wilderness at the later period described by the legislator, *Menu*, vi. § 2, there is nothing to prevent partition at that time, since the cessation of the mother's courses must have previously taken place, *Srikrishna*, *Jim. Vahana*, note to § 39.

THE VICE AND DISEASE MUST BE SUCH AS PRODUCE DEGRADATION FROM CASTE.—*Sir Thomas Strange* says, Adverting to the various opinions that have been entertained on the question, the practical difference among them, says an eminent commentator, *Colebrooke*, regards chiefly the cases of vice and profligacy with lasting disease, and consequent disqualifications, and incapacity, subjoining, however, that without consent of the head of the family it is not in such cases allowed by the prevalent authorities of Bengal, unless the vice or disease be such as to induce degradation from caste, *Coleb. M. S.* 1 *H. L.* 183.

AGE, IMPAIRMENT OF MIND, AND BODILY DISEASE, ARE NOT CAUSES OF PARTITION—BUT OF APPOINTMENT OF SON AS MANAGER.—*Harita*

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says, "If he (the father) be decayed, remotely absent, or affected with disease, let the eldest son manage the affairs as he pleases," so *Sankha* and *Likhita* explicitly declare, "If the father be incapable let the eldest (son) manage the affairs of the family, or with his consent a younger brother conversant with business; partition of wealth does not take place if the father be not desirous of it, when he is old, or his mental faculties are impaired, or his body is afflicted with a lasting disease. Let the eldest, like a father, protect the goods of the rest, for the support of the family is founded on wealth. They are not independent while they have their father living, nor while the mother survives," *Jim. Vahana*, ch. i. § 42. Primogeniture does not give any title to the management, but capacity for business, though where the qualifications are equal, the eldest would have the preference, *Stra. H. L.* 184; 2 *ib.* 326, 331, 333, 335, 342; *Menu*, ch. ix. § 105; 2 *Dig.* 528.

HIS ACTS BIND THE FAMILY PROPERTY, BUT CONSENT NECESSARY TO ALIENATION.—The acts af the managing member, when for the uses of the family, are binding upon it, but in alienating the property, the consent of the co-partners, expressed or implied, is necessary, 1 *Stra. H. L.* 199, 200; *Stra. Man. H. L.* § 243.

SECTION V.

PARTITION AGAINST FATHER'S CONSENT OF ANCESTRAL PROPERTY.

Partition against father's consent of ancestral property—In Bombay, sons entitled to division of ancestral property—Lost, but recovered, not within the rule—Self-acquired property not within the rule—In Madras—Sons and grandsons may compel division of ancestral estate—Decision based on erroneous quotation from Menu—Partition without the father's consent is illegal—But with his consent binds him, though absent at the time—But without his consent does not bind the son who made it—Self-acquired property—Sons have no claim—What is self-acquisition—Explanation of acquisitions by learning—Bengal school—Gains by labour, by science, learning—Explanation of—Without use of patrimony—What is gained solely by his own ability—By learning—Gifts by science—Valour—Not if joint-stock used in acquisition—Support of family of a brother learning science—Gains of learning must be shared by a learned co-heir—Bombay school—Lost property acquired—Recovery of ancestral property lost—Bengal school—Ancestral property recovered—Madras school—Gains of science, &c.—In Madras applies to moveable property—In Bengal and Bombay to both—Special rule with regard to land recovered—In Madras sons have some interest in self-acquired immoveable property—Undecided whether sons can compel division of self-acquired immoveable property—Self-ac-

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quired moveable property—Owner may divide—Renunciation—Enumeration of subjects of acquisition—Acquisition must be made without charge to the patrimony—If such acquisitions obtained from common stock—Acquirer entitled to a double share—Exception with regard to acquisitions by learning—Exception with regard to wealth acquired without detriment to the paternal estate—Gifts from father, &c.—Where acquisitions by valour are distributable—Gifts of affectionate kindred—Wealth acquired by labour—Employment in agriculture—Other exemptions from partition—Brothers living in union are entitled to lands purchased by their acquisitions in proportion to the funds contributed by them respectively—Property acquired by brothers should be distributed among them according to the labour and funds employed by each—Acquisitions made by means of the patrimony—Land purchased by one co-heir with borrowed money—Property exclusively acquired by one co-heir is not to be shared by his brethren—Interest of father in wealth acquired by united sons—Where one brother associates with another in developing his property—House built on joint land—In Benares, augmentation of common fund of co-heir does not entitle to extra share—In Bengal, owner of self-acquisitions entitled to double share—Acquisitions by one of four with joint-funds, or with personal aid of the brothers' two-fifths, go to acquirer—In Benares—Self-acquisitions without the aid of joint funds—Lost property recovered—Exception in case of land, recovery of which entitles acquirer to a fourth—Acquirer takes a double share where ancestral property used in acquisition—Lands purchased by means of marriage gift, or yautaca—A united half-brother shall not participate in the self-acquisitions of his co-proprietors—Improvement of undivided property—Agreement between members respecting expenditure of self-acquired funds—Improvement of undivided property—Agreement between members respecting expenditure of self-acquired property—Benamee purchase by a member of a joint family does render the property self-acquired—Fraudulent concealment of common property.

OF ANCESTRAL PROPERTY—IN BOMBAY, SONS ENTITLED TO DIVISION OF ANCESTRAL PROPERTY.—Partition of ancestral property may take place without the father's consent in Bombay. *Brihaspati* declares partition in some cases without his wish, "The father and sons are equal sharers in houses and lands derived regularly from ancestors; but sons are not worthy [in their own right] of a share in wealth acquired by the father himself when the father is unwilling." From which it results, "that sons are worthy of a share in property acquired by the grandfather, or other [ancestor,] even though the father do not wish it," *Mayukha*, ch. iv. s. iv. § 4. This doctrine has been followed in a case in the High Court at Madras, *Nagalinga Mudali* v. *Subbiramaniya*, 1 *Mad. H. C. R.* 77 See *infra*, p. 351.

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ANCESTRAL PROPERTY LOST, BUT RECOVERED, AS SELF-ACQUIRED NOT WITHIN THE RULE.—But this rule does not apply to ancestral property where such property has been lost, and could not be recovered by the ancestor, but has been recovered by the efforts of his son, and at his sole expense. Such property classes as self-acquired property, and follows the rule applicable to property gained, by science, valour, or the like, *Menu*, ch. ix. § 209 ; *Vishnu*, *Brihaspati*, *Mayukha*, ch. iv. s. iv. § 5.

MADRAS SCHOOL—SONS OR GRANDSONS MAY COMPEL A DIVISION OF ANCESTRAL PROPERTY.—We have seen that in the Bengal school the opinion is, that under no circumstances can a son exact from his father a division of ancestral property except in cases of civil death, (entering a religious order,) or of degradation of caste, working a forfeiture of civil rights, these two exceptions being applicable to Hindoo law in general. But with regard to the law of the Madras Presidency and elsewhere in the peninsula, *Sir Thomas Strange*, 1 *H. L.* 184, holds, that partition of ancestral property, independent of the father's will, is authorised, but only under circumstances which would justify it—viz., when the father has become superannuated, the mother past child-bearing, and the sisters also married—while *Mr Strange, Man.* § 245, holds, that sons may, irrespective of all circumstances, compel a division, citing the *Mitacshara*, ch. i. s. v. § 8. The point has recently been decided by the High Court of Madras, in conformity with *Mr Strange's* opinion, holding that sons, or grandsons may compel a division against the will of the father, or grandfather of ancestral property, leaving the question open as to a division of acquired property, *Nagalinga Mudali* v. *Subbiramaniya Mudali*, 1 *Mad. H. C. R.* 77. In delivering judgment, *Scotland, C. J.*, said, The plaintiff may, I think, maintain the suit. I have had some difficulty in seeing how ch. i. s. ii. § 7 of the *Mitacshara*, is to be reconciled with the placita in the fifth section of the same chapter. But upon consideration, I think that they are not necessarily inconsistent, and that sons may compel a division of ancestral family property at the hands of their father. I must, however, be distinctly understood as deciding this with reference to ancestral property only. The Advocate-General refers to *Sir Thomas Strange's* work on Hindoo law, and no one can read the passages cited without coming to the conclusion that the opinion of that author was, that except in the instances he gives—namely, of civil death by entering into a religious order, and of degradation, working a forfeiture of civil rights, sons could not compel a division. *Sir T. Strange* (1, 179) says, Whatever might be the case among the Hebrews, no Hindoo can, according to the law, as it prevails in the Bengal provinces, under any circumstances, say to his father in the peremptory language of the prodigal, " Father, give me the portion of goods that falleth to me." The father may abdicate in favour of one or of all, accord-

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ing to the limits imposed upon him by the law, if he thinks proper; but, with the exception of two cases, partition among the Hindoos, in the lifetime of their father, whether of ancestral or acquired property, would seem to be at his will, not at the option of his sons, and in support of this he cites *Menu*, ix. § 104, and the *Mitacshara*, ch. i. s. ii. Turning to the latter, we find at § 7, One period of partition is when the father desires separation, as expressed in the text, "When a father makes a partition. Another period is while the father lives, but is indifferent to wealth and disinclined to pleasure, and the mother is incapable of bearing more sons, at which time a partition is admissible at the option of sons against the father's wish." *Sir Thomas Strange* proceeds, (1, 179, 180,) "A text, indeed, of *Menu* is referred to as showing that of ancestral property belonging to the father, the sons may at their pleasure exact a division of him, however reluctant, and it is true (as has been already intimated) that their claim upon property descended is stronger than upon what has been otherwise acquired, but the inference drawn in the *Mitacshara* is at variance with the current of authorities, including *Menu* himself, whose obvious meaning in the text referred to is simply that ancestral property *recovered* without the use of the patrimony, classes upon partition with property acquired." And passing on to consider the law applicable to this Presidency, the same learned author says, (1, 184,) "In the provinces dependent on the Government of Madras, and elsewhere in the Peninsula, the right of the son to exact partition of ancestral property, independent of the will of the father, appears authorized, but not without the existence of circumstances to warrant the measure, such as the father having become superannuated, and the mother past child-bearing, the sisters also married. And there are two occasions, upon either of which, wherever the Hindoo law prevails, dominion may be transferred from the father in his life without his consent, whether the property, claimed by the sons to be divided, be ancestral, or acquired; these are voluntary devotion by which the father is considered as having renounced it, and degradation from caste by which it is forfeited."

I do not find in *Sir Thomas Strange's* work anything to get rid of this qualification as to the right of sons to a division in their father's lifetime. But in *Mr Justice Strange's Manual of Hindoo Law* the learned author states the law in the broadest possible terms. He says, in § 238, "Sons may, at their will, and irrespective of all circumstances, compel their father to divide with them the ancestral property," and for that he cites *Mitac.* ch. 1. s. v. § 8. Turning to that passage, we find he is abundantly confirmed. It is in these words, "Thus while the mother is capable of bearing more sons, and the father retains his worldly affections, and does not desire partition, a distribution of the grandfather's estate does, nevertheless, take place by the will of the son." Certainly nothing can be more explicit; and at § 11, *Vignyanesvara* says, *Menu* likewise

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shows that the father, however reluctant, must divide with his sons at their pleasure the effects acquired by the paternal grandfather, and then he refers to the text in *Menu* ix. § 209, to which *Sir Thomas Strange* alludes, when he says that the inference drawn in the *Mitacshara* is at variance with the current of authorities.

I think we must consider the *Mitacshara*, ch. i. s. ii. § 7, as applicable to the law governing the division of property generally, and s. v. § 8 and 11 as applying to division of ancestral property.

The *Mitacshara*, therefore, in my opinion, confirms the view taken by *Mr Justice Strange* in his *Manual*, and in this Presidency the *Mitacshara* is the governing authority. I think, therefore, that as to ancestral property a son, and therefore a grandson, may compel a division against the will of the father or grandfather.

Bittlestone, J., adds, The authorities appear to stand thus :—*Sir Thomas Strange* seems to have formed an opinion that sons could not demand a division except under particular circumstances, even as regards ancestral property ; but he admits that in coming to that opinion he differs from the *Mitacshara*. Arguing from *Menu*, *Sir Thomas Strange* arrives at one conclusion, and the author of the *Mitacshara*, also arguing from *Menu*, comes to another. Referring to the *Mitacshara*, it is not easy to follow his reasoning on the subject ; but it is desirable to arrive at some definite rule. The learned author of the *Manual*, bringing to the matter the long experience which he has had, and probably the decisions which have taken place subsequently to the publication of his father's work, says broadly, that so far as ancestral property is concerned, sons may, at their will, and irrespective of all circumstances, compel their father to divide with them the ancestral property ; and in that proposition he is supported by the statement in the *Mitacshara*, that though the mother be capable of bearing sons, and though the father retain his worldly affections, and does not desire partition of the ancestral (grandfather's) estate, partition does, neverthetheless, take place by the will of the sons. This, doubtless, is not easily reconcilable with the statement in the earlier section ; but they may, perhaps, be reconciled by saying that in the earlier section division generally is treated of, and that the latter section is confined to the division of ancestral property. On the whole, it seems more satisfactory to us to decide that the right exists absolutely than that it should depend upon the feelings or disposition of the father, or the physical condition of the mother.

This case is based on an erroneous quotation from Menu.—The decision of the Chief Justice in this case, (concurred in by *Sir A. Bittlestone*, whose language is even stronger than the Chief Justice's,) is founded upon the inference that the authority (upon which the author of the *Mitacshara* relies in ch. i. s. v. § 8, 11, namely, ch. ix. § 209 of *Menu*, has been correctly quoted) differs from the rule laid down by *Sir Thomas Strange*, who refers likewise to the *Mitacshara*. The words in § 11, assigned by the *Mitacshara* to

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Menu, are, "If the father recover paternal wealth not recovered by his co-heirs, he shall not, unless willing, share it with the sons, for in fact it was acquired by him." But if we refer to *Sir W. Jones's* translation, which in this respect has been followed by *Mr Houghton*, we shall find § 209 to have been thus rendered: "And if a son by his own efforts recover *a debt or property unjustly detained*, which could not be recovered before *by his father*, he shall not, unless by his free will, put it into parcenery with his brethren, since in fact it was acquired by himself." Unless it be shown that *Sir W. Jones's* translation be incorrect, we cannot but conclude that the decision of the High Court is based upon an erroneous quotation of *Menu* by the author of *Mitacshara*, on a subject to which the question before the High Court had no reference, *ante.* pp. 345, 346.

PARTITION WITHOUT THE FATHER'S CONSENT IS ILLEGAL.—A. had three sons; the youngest absconded, and the father followed to make inquiries after him; the other two remained at home. In the absence of the father the eldest son adjusted the proportion of his father's share of the joint property by arbitration. Held, that any partition of joint property made by arbitration without the father's permission cannot be considered as lawful, 2 *Macn. Prins. H. L.* 148.

BUT WITH HIS CONSENT BINDS HIM, THOUGH ABSENT AT THE TIME. —But if the father left directions with the eldest son to adjust the dispute regarding his share of the immoveable property, held in union with his co-heirs, which was accordingly done by arbitration, but the father, on his return, was not satisfied with the adjustment, the partition of the estate is good and binding, even though the father, after his return, wish to recede from it, 2 *Macn. Prins. H. L.* 149.

BUT WITHOUT HIS CONSENT DOES NOT BIND THE SON WHO MADE IT. —A person had an only son who, in his father's absence, chose an arbitrator, and caused a partition of his father's ancestral immoveable property, which was held in union with his other co-heirs, and the father having returned home dissented from the partition, and then died. The son who caused the partition wishes to recede from it. Held, that the partition of the father's joint immoveable and other property, made by the award of an arbitration during the father's absence, without his express permission, and to which the father after his return did not consent, is illegal, and the son who caused it to be made may recede from it, 2 *Macn. Prins. H. L.* 150.

PARTITION OF SELF-ACQUIRED PROPERTY WITHOUT THE CONSENT OF THE FATHER.—Upon a consideration of all the authorities it will be seen that the sons have no claim by reason of birth or otherwise to what is self-acquired, and called the father's wealth, as distinguished from that which has come to him by descent, and denominated ancestral estate. It is true that on his decease the sons will become entitled to self-acquired property if it has not

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been otherwise disposed of, *Brihaspati*, *Jim. Vahana*, ch. vi. § 34, but they cannot enforce a partition of it against the father's will, as they can of ancestral property. In the *Mayukha*, ch. iv. s. iv. § 4, *Brihaspati* is cited in support of this view. He draws the distinction between the two classes of property, and while he admits the right of the sons in the one case, he denies it in the other. He says, "Fathers and sons are equal sharers in houses and lands derived regularly from ancestors, but sons are not worthy [in their own right] of a share in wealth *acquired by the father himself* when the father is unwilling," *Jim. Vahana*, *supra*.

WHAT IS SELF-ACQUISITION.—What a brother has acquired by his labour without using the patrimony he need not give up to co-heirs; nor what has been gained by science, *Menu*, ch. ix. § 208; *Mayukha*, ch. iv. s. vii. § 4; *Jim. Vahana*, 109, 117, ch. vi. s. i. 3 *Dig.* 339. What a man gains by his own ability without relying on the patrimony, he shall not give up to the co-heirs, nor what he acquired by learning, *Vyasa*, *Mayukha*, ch. iv. s. vii. § 4; *Jim. Vahana*, ch. vi. s. v.; 3 *Dig.* 311.

EXPLANATION OF ACQUISITION BY LEARNING.—Wealth gained through science which was acquired from a stranger while receiving a foreign maintenance is termed acquisition through learning, *Katyayana*, *Mayukha*, ch. iv. s. vii. § 4.

BENGAL SCHOOL.—So in Bengal, *Jim. Vahana*, ch. vi. s. i. § 3; *Menu*, ch. ix. § 208; and *Vishnu*, 18, 42, are cited as declaring that, "What a brother has acquired by his labour without using the patrimony, he need not give up without his assent, for it was gained by his own exertion," * *Jumeeyut Lal* (pauper) v. *Huqeequt Rai*, 2 *Macn. Prins. H. L.* 155, and the reason for the exception is thus explained, Since the patrimony is not used there is no exertion on the side of the others through the means of the common property, and since it was obtained by the man's own labour there is no corporeal effort on the part of the rest, it is therefore the separate property of the acquirer alone, for the phrase, "It was gained by his own exertion" is stated as a reason; and *Vyasa* ordains what a man gains by his own ability, without relying on the patrimony, he shall not give up to the co-heirs, nor that which is acquired by his learning, *Jim. Vahana*, ch. vi. s. i. § 5, 35, 36; 2 *Macn. Prins. H. L.* 152.

Since it is expressed in general terms, "What he gains solely by his own ability," all property so acquired being his own is not common, but as the gains of science though obtained by the man's own ability are shared by parceners equally or more proficient in knowledge, the phrase, "Nor that which is acquired by learning" is subjoined for the sake of excluding illiterate, or less learned parceners, *Jim. Vahana*, ch. vi. s. i. § 6. So a present from a friend, or a gift at nuptials, does not appertain to the co-heirs, *Yajnavalchya*, 2,

* See *Mitac.* ch. i. s. iv. § 10, where a different reading is given to the second half of the text.

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119, *Jim. Vahana*, ch. vi. s. i. § 7. So wealth acquired by learning, and anything given by a friend, received on account of marriage, or presented as a mark of respect, *Menu*, ch. ix. § 206, *ib.* § 9. So what is gained by science or earned by valour, or received from affectionate kindred, *Vyasa*, *ib.* § 10. So what is gained by valour, the wealth of a wife, what is acquired by science, and any favour conferred by a father, *Narada*, 13, 6; *ib.* § 12.

NOT IF JOINT STOCK USED IN ACQUISITION.—But if the common goods be employed in the acquisition of wealth by valour it follows the rule of ancestral property, and is distributable against the volition of the father, *Vyasa*. So he who maintains the family of a brother studying science shall take, be he never so ignorant, a share of the wealth acquired by science, *Narada*, 13, 10, 11. What has been gained by a learned man without using the paternal estate, he need not give up to an unlearned co-heir, but he must share it with a learned co-heir, *Gautama*, 28, 28; *Katyayana; Srikrishna; Jim. Vahana*, ch. iv. s. i. § 17–22. See *post*, "Effects liable or not liable to partition."

BOMBAY SCHOOL—LOST PROPERTY ACQUIRED.—The *Mayukha* points out that, although in the strict sense of the term the estate may have been ancestral, yet, if it were a debt, or property unjustly detained and lost to the ancestor, but regained by the personal exertions of his son, and at his sole cost, it passes into that class of property which is denominated self-acquired, and ranks with wealth acquired by science, valour, or the like, and partakes of its incidents, one of which is, that it does not come into co-parcenery with sons, and is therefore not liable to partition, unless by the free will of the father, *Menu*, ch. ix. § 209; *Vishnu*, *Mayukha*, ch. iv. s. iv. § 5; s. vii. § 2. See *post.*

APPLIES TO MOVEABLE PROPERTY IN MADRAS: IN BENGAL AND BOMBAY, TO BOTH.—This applies to moveable property in Madras, and is the doctrine of the Bengal and Maharashta schools, with respect to both moveable and immoveable property, 1 *Macn. P. H. L.* 43, *et seq.*

In the grandfather's property also partition in some cases depends on the father's pleasure, see *Menu*, ch. ix. § 209, and *Vishnu*. "And if a father by his own efforts recover [a debt or property unjustly detained,] which could not be recovered before [by his father,] he shall not, unless by his free will, put it into parcenery with his sons, since in fact it was acquired by himself," *Brihaspati*. "Over the grandfather's property which has been seized [by strangers,] and is recovered by the father through his own ability, and over [anything] gained by him through science, valour, or the like, the father's full dominion is ordained. He may give it away at his pleasure; or he may defray his consumption with such wealth, but on failure of him the sons are entitled to equal shares," *Mayukha*, ch. iv. s. iv. § 5.

BENGAL SCHOOL—ANCESTRAL PROPERTY RECOVERED.—And the

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same rule prevails in Bengal as in Bombay, with reference to hereditary property taken away, and which has been recovered, *Yajnavalchya*, 2, 119, 120; *Jim. Vahana*, ch. vi. s. i. § 33, 40; s. ii. § 31; *Menu*, ix. § 209. *Brihaspati* says,—"Over the grandfather's property which has been seized [by strangers,] and is recovered by the father through his own ability, and over [anything] gained by him through science, valour, or the like, the father's full dominion is ordained. He may give it away at his pleasure, or he may defray his consumption with such wealth; but on failure of him, the sons are pronounced entitled to equal shares," *Jim. Vahana*, ch. vi. s. ii. § 34.

SPECIAL RULE WITH REGARD TO LAND RECOVERED.—Thus the rule must be understood in the instance of any such hereditary property, other than land, exactly as in the case of property not hereditary, but acquired by the man himself, *Jim. Vahana*, ch. vi. s. ii. § 37. *Sankha* propounds a special rule regarding land,—"Land inherited in regular succession, but which had been formerly lost, and which a single [heir] shall recover solely by his own labour; the rest may divide according to their due allotments, having first given him a fourth part," *ib.* § 38. So that ancestral lands, when recovered by any member without the aid of family funds, may be regarded as self-acquired; but not being so considered, the acquirer may claim one fourth of it, and then divide the rest among the whole family, he getting a second share by this division. Here, again, he may treat it as self-acquired, and it is of his own mere choice that such lands go to the family.

MADRAS SCHOOL.—In the *Mitacshara*, ch. i. s. iv. § 2, the passage before cited from *Yajnavalchya*, 2, 119, 120, is relied on. Upon which the following exposition is given,—"That which had been acquired by the co-parcener himself without any detriment to the goods of his father or mother, or which has been received by him from a friend, (see *Rewun Persad* v. *Mt. Radha Beeby*, 4 *Moore's In. Ap.* 162, *per Wigram arguendo*,) or obtained by marriage shall not appertain to co-heirs of brethren. Any property which has descended in succession from ancestors, and had been seized by others, and remained unrecovered by the father, and the rest through inability, or for any other cause, he, among the sons who recovers it, with the acquiescence of the rest, shall not give up to the brethren or other co-heirs; the person recovering it shall take such property." See 2 *Stra. H. L.* 379.

IN MADRAS SONS HAVE SOME INTEREST IN SELF-ACQUIRED IMMOVEABLE PROPERTY.—The sons certainly possess some interest in self-acquired immoveable property in Madras, inasmuch as there a father cannot alienate his self-acquired immoveable property without the concurrence of his sons; and failing sons, their sons' grandsons, 2 *Stra. H. L.* 11; *Mitac.* ch. i. s. i. § 27.

UNDECIDED WHETHER SON CAN COMPEL DIVISION OF SELF-ACQUIRED IMMOVEABLE PROPERTY.—But it does not appear to be yet decided

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whether a son can compel a father to divide against his will separate acquired immoveable property. The decision of the High Court at Madras has reference only to ancestral property, and the *Mitacshara* is silent with respect to compulsory division of self-acquired immoveable property.

SELF-ACQUIRED MOVEABLE PROPERTY—THE OWNER MAY DIVIDE IT AS HE LIKES.—Self-acquired moveable property cannot be divided by a court of law, unless the owner choose to share it. *Sir Thomas Strange*, 1 *H. L.*, p. 196, lays it down that he must divide it in equal shares, he taking a double portion ; but the more correct and reasonable rule is that of *Mr Strange*, *Man. H. L.*, § 249, that he may divide it in any manner he pleases, keeping what he likes for himself.

RETRACTION. — Both authorities agree in saying that such shares of acquired property may be recalled by the father in case of subsequent indigence, 2 *Macn. Prins. H. L.* 148 ; *Harita*, cited in the *Vivada Chintamani*. But this perhaps is merely *directory*, for no retraction of voluntary gifts is allowed in England ; this recall of the shares, therefore, must be regarded as of doubtful authority.

ENUMERATION OF SUBJECTS OF ACQUISITION.—" What is gained by the solution [of a difficulty] after a prize has been offered must be considered as acquired by science. What has been obtained from a pupil, or by officiating as a priest, or for [answering] a question, or for determining a doubtful point, or through display of knowledge, or by success in disputation, or for superior skill in reading, are gains of science, and not subject to distribution," *Mayukha*, ch. iv. s. vii. § 5 ; *Jim. Vahana*, 127, ch. vi. s. ii. § 1 ; 3 *Dig.* 333.

The law is the same in regard also to artisans, and to increase of price. A prize which has been offered for the display of superior learning, and a gift received from a votary for whom a sacrifice was formerly performed, or a present from a pupil formerly instructed, are the acquisitions of science. What is otherwise acquired is [the] property [of co-heirs.] What is won by surpassing another in learning, after a stake has been deposited, is the acquisition of science, and impartible. So what is obtained by the boast of learning, what is received from a pupil, or for the performance of a sacrifice, *Brihaspati*, *Bhrigu*, *Mayukha*, ch. iv. s. vii. § 5 ; 3 *Dig.* 334.

" Solution," " Display," " Superior reading," " In regard also to artisans," " Increase of price," " Performance of a sacrifice," are explained in *Mayukha* ch. iv. s. vii. § 6.

THE ACQUISITION MUST BE MADE WITHOUT CHARGE TO THE PATRIMONY.—Here the phrase, " Anything acquired by himself without detriment to the father's estate" must be everywhere understood, and it is thus connected with each member of the sentence ; what is obtained from a friend without detriment to the paternal estate ; what is received in marriage without waste of the patrimony ; what is redeemed of the hereditary estate without expenditure of ancestral property ; what is gained by science without use of the

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father's goods; consequently, what is obtained from a friend as the return of an obligation conferred at the charge of the patrimony; what is received at a marriage concluded in the form termed *Assoora*,* or the like; what is recovered of the hereditary estate by the expenditure of the father's goods; what is earned by science acquired at the expense of the ancestral wealth; all that must be shared with the whole of the brethren, and with the father, *Mitac.* ch. i. s. iv. § 6, 7; *Narada*, 13, 10, and *Katyayana;* see *Laximon Row Sudasew* v. *Mullar Row, Bajee.* 2 *Knapp's P. C.* 60, 63; *Menu*, ch. ix. § 204; see 2 *Stra. H. L.* 357.

IF SUCH ACQUISITIONS OBTAINED FROM COMMON STOCK.—If, however, in any of those cases the acquisition was not obtained without loss or detriment to the paternal estate, then the rule of indivisibility does not apply, *Katyayana.* See 3 *Dig.* 340. Yet *Brihaspati* has ordained that wealth shall be partible, if it be gained by learned brothers, who were instructed in the family by their father, or paternal grandfather, [or uncles,] and it is the same if wealth were acquired by valour [with assistance from the family estate,] *Brihaspati, Mayukha*, ch. iv. s. vii. § 7.

If the rule be carried out to its legitimate results, it is so general in its operation, there is no possible case in which it will not apply, for all men are indebted to their paternal estate for their acquisitions in one sense.

But even in cases coming within the exception, although the acquisitions may be divisible, the acquirer is entitled to a double share. "He amongst them who has made an acquisition may take a double portion of it," *Vasishtha; Mayukha*, ch. iv. s. vii. § 8; see *Jim. Vahana*, p. 39, ch. ii. § 41; 3 *Dig.* 109, 356.

EXCEPTION WITH REGARD TO ACQUISITIONS BY LEARNING.—A further exception has been engrafted on the rule in regard to the acquisition of wealth through learning. He who maintains the family of a brother studying science, shall take, even though not told, (that is, not promised,) a share of the wealth gained by science, *Narada, Mayukha*, ch. iv. s. vii. § 9. See *Madana Ratna, Mitac.* p. 270, ch. i. s. iv. § 8; *Jim. Vahana*, p. 111, ch. vi. s. i. § 14; 3 *Dig.* 361.

EXCEPTION WITH REGARD TO WEALTH ACQUIRED WITHOUT DETRIMENT TO THE PATERNAL ESTATE.—"His own acquired wealth, a learned man may, if he please, give up to unlearned co-heirs," says *Gautama. Katyayana* says, "No part of the wealth which is gained by science need be given by a learned man to his unlearned co-heirs; but such property must be yielded by him to those who are equal, or superior in learning." A learned man need not give a share of his own acquired wealth without his assent to an unlearned co-heir; provided it were not gained by him using the paternal estate. But, according to *Madana*, this prohibition applies

* For at such a marriage wealth is received by the father or kinsman of the bride, *Mitac.* p. 269, ch. i. sec. iv. n. 6.

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only where there exists other property, for those brothers who are present; but on failure of other property [a share of it] even must be given to them, *Mayukha*, ch. iv. s. vii. § 10; *Jim. Vahana*, ch. vi. s. 1, § 16.

GIFTS FROM THE FATHER, &c.—That is impartible which has been given by the father, or other [person.] "That which may have been given by the paternal grandfather, or father, or mother, is not to be taken back any more than wealth acquired by valour or the wealth of a wife," *Vrihaspati; Narada*, Excepting what is gained by valour, the wealth of a wife, and what is acquired by science, which are three sorts of property exempt from partition, and any favour conferred by a father; *Katyayana*, So that which is taken under a standard is not distributable, also what is seized [by a soldier] in war, after routing the forces of the enemy, and after risking his life for his lord, is spoil taken under a standard. When a soldier performs a gallant action, despising danger, and favour is shown him by his lord, whatever property is then received by him shall be considered as gained by valour, *Mayukha*, ch. iv. s. vii. § 11; 3 *Jim. Vahana*, 131, ch. vi. s. ii. § 20; 3 *Dig*. 369.

WHERE ACQUISITIONS BY VALOUR ARE DISTRIBUTABLE.—There is an exception to this rule where gains by valour, or the like, are obtained by one of the brothers, by means of any common property, such as a vehicle, or weapon, or the like. To him two shares should be given, and the rest should share alike, *Vyasa, Mayukha*, ch. iv. s. vii. § 12. See *Jim. Vahana*, 111, ch. vi. s. i. § 14; 3 *Dig*. 71.

GIFTS OF AFFECTIONATE KINDRED—SAUDUYACAM.—That which is received by a married woman or by a maiden in the house of her husband, or of her father, from her husband, or from her parents, *Vyasa*, what is received with a damsel equal in class at the time of accepting her [in marriage,] is wealth received with a maiden, which, like wealth acquired by learning, is impartible, if it be acquired without detriment to the father's estate, *Mayukha*, ch. iv. s. vii. § 13, 14.

WEALTH ACQUIRED BY LABOUR, EMPLOYMENT IN AGRICULTURE.—*Menu*, ch. ix. § 205, (2 *Dig*. 584,) says, And if all of them being unlearned acquire property [before partition] by their own labour, there shall be an equal division of that property [without regard to the first born,] for it was not the wealth of their father—this rule is clearly settled, *Mayukha*, ch. iv. s. vii. § 14.

OTHER EXEMPTION FROM PARTITION.—*Menu*, ch. ix. § 219, says Clothes, vehicles, ornaments, prepared food, water, women, sacrifices, and pious acts, as well as the common way, are not liable to distribution. Clothes, conveyances, and ornaments, belong respectively to the possessor, if they are of equal value. If the value of one article be more or less than the value of another, then let them be divided, *Mayukha*, ch. iv. s. vii. § 15; see *Mitac*. 272, ch. i. s. iv. § 16–18; *Jim. Vahana*, 132, ch. vi. s. ii. § 23, 24; 3 *Dig*. 373. This subject is fully discussed in the *Mayukha*, ch. iv. s. vii.

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Brothers living in union are entitled to the lands purchased by their acquisitions in proportion to the funds contributed by them respectively.—Two brothers living jointly had acquired wealth by their separate exertions, with which they purchased lands. The proportions in which they contributed did not appear, but the proportion contributed by the respondent was much greater than that contributed by the appellant. It was held, that the property acquired by the brothers while living jointly, without using the paternal estate, becomes his exclusive property, and that purchased by the respondent becomes his own estate. If the property was purchased with a greater share of the respondent's funds, the less sum being contributed by the appellant while they were living together, each is entitled to share the estate in proportion to the funds respectively contributed by them to the purchase of the property. Whatever property may be ascertained to have been purchased by each of the parties, each is entitled to, and such portion should be considered the exclusive property of each; but where the proportionate contribution of each may not be determined, there is no rule in the law by which the respective shares to which each is entitled can be ascertained, *Yajnavalchya; Jim Vahana; Dayarushasya: Koshul Chuckrawutee* v. *Radhanath Chuckrawutee*, 2 *Macn. Prins. H. L.* 154.

Property acquired by brothers should be distributed among them according to the labour and funds employed by each.—A father died, leaving four sons, and some self-acquired landed property. Afterwards the sons living united purchased by their respective acquisitions some lands, and annexed them to the original estate. The property is distributable, if there is any means of discriminating how much either of funds or labour was contributed by each of the brothers, according to their respective contributions. The ancestral property going to them equally,* *Vyasa, Ramchunder Das* v. *Gungadhur Mahtee*, 2 *Macn. Prins. H. L.* 160.

Acquisitions made by means of the patrimony.—With regard to acquisitions made through means of the patrimony, the *Mitacshara* lays down two rules, which do not appear very clear or easy to be applied in practice; at § 29, s. iv. ch. i., it is stated, that whatever is acquired at the charge of the patrimony is subject to partition; but according to the text of *Vasishtha*, the acquirer shall in such case have a double share. What is here meant by the words, "At the charge of the patrimony," does not distinctly appear; for we find at § 31 a rule laid down in apparent contradiction of the above text, "Among unseparated

* This supposes that the funds used for the acquisition had not been derived from the ancestral estate. In that case, the rule is, that a double share only goes to the acquiring brother. The brethren participate in that wealth which one of them gains by valour or the like, using any common property, either a weapon or a vehicle: to him two shares should be given; but the rest should share alike, *Vyasa, Jim. Vahana*, p. 111, ch. vi. s. i. § 14.

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brethren, if the common stock be improved or augmented by any one of them through agriculture, commerce, or similar means, an equal distribution, nevertheless, takes place, and a double share is not allotted to the acquirer." *Mr Strange, M. H. L.* § 276, following § 29 of the *Mitacshara*, conceives that it has reference to "a distinct acquisition." But what is meant by a distinct acquisition, apart from augmentation of the common stock, is difficult to conceive. *Mr Colebrooke*, 2 *Stra. H. L.* 283, calls it a "separate acquisition," and in all probability *Mr Strange* has followed *Mr Colebrooke*, who, however, does not explain the distinction between the texts of the *Mitacshara*, if any distinction in reality can be drawn between them, so as to reconcile the apparent contradiction in the rules. *Mr Ellis* would appear to have arrived at a better construction, in which he would seem to have been followed by *Sir Thos. Strange*, 1 *H. L.* 220, 221. *Mr Ellis* says,—With respect to the division among the brothers, the better mode is—1st, To divide the property descended from the ancestors into equal shares; 2d, To divide what has been acquired by the possessors into unequal shares, giving a larger share to the acquirer, leaving the proportion to the common consent of the co-parceners, or, in case of dispute, to the discretion of the judge. The law, though it mentions a specific proportion, intending it as an example, not as a precept, 2 *Stra. H. L.* 383, 384.

Jimuta Vahana, throughout ch. vi. of the *Daya Bhaga*, s. i. § 23, would appear to argue in favour of the proposition of *Mr Ellis;* he says, that where the exertion of one is merely through the joint property, and the other contributes to the acquisition by his person and wealth, it is a rule suggested by reason, that the one shall have a single share, and the other two. Hence, likewise, it follows, that if the joint stock be used, shares should be assigned to each person in proportion to the amount of his allotment, be it little or much which has been used. The *Mayukha* follows the text of the *Mitacshara* already cited.

Lands purchased by one co-heir with borrowed money.—Lands purchased by one member of an united family with borrowed money cannot be claimed by another who has not joined in the transaction, 2 *Macn. Prins. H. L.* 151. But if it happened with his consent, then he is entitled to participate, and must pay the debt proportionably, *ib.*

Property exclusively acquired by one co-heir is not to be shared by his brethren.—The father of the appellants and the grandfather of the respondent were a joint family. A purchase of a zemindary by the latter, with the produce of his separate industry, and without any aid from friends, ancestral or paternal, no one else can participate in it, citing *Menu, Vishnu, Jim. Vahana*, 2 *Macn. Prins. H. L.* 152.

Interest of father in wealth acquired by united sons.—In wealth acquired by sons while living in union with the father, he

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has a co-ordinate interest; but if it were obtained irrespective of the father or his property, it is the son's, 1 *Stra. H. L.* 63, 64.

WHERE ONE BROTHER ASSOCIATES WITH ANOTHER IN DEVELOPING HIS PROPERTY.—If one brother has acquired property individually, and in developing it, associates another brother with him, they are each entitled to a share, or moiety, of such property. See *Abraham* v. *Abraham*, 9 *Moore's In. Ap.* 529.

HOUSE BUILT ON JOINT LAND.—If one build a house on ancestral land with separate funds of his own, such house would not be property in which shares might be claimed by co-parceners, they would only have a claim on him for other similar land equal to their respective shares. Such is the custom or unwritten law, *Khodeeram Serma* v. *Tirlochun*, 2 *Macn. Prins. H. L.* 152, and authorities quoted.

AUGMENTATION OF THE COMMON FUND.—The augmentation or improvement of the common stock by one of the co-heirs does not entitle him to an extra share, if the increase be gradually added to the property, and is not, in the strict sense, self-acquired, *Mitacshara*, ch. i. s. iv. § 31; 1 *Stra. H. L.* 213, *e.g.*, the managing member may trade with the funds so as greatly to increase them; he gets however only his regular share.

ACQUISITIONS BY UNASSISTED LABOUR.—But, according to the Bengal school, an acquisition made by one co-heir by means of his own unassisted and exclusive labour entitles the acquirer to a double share.

BY JOINT FUNDS OR PERSONAL LABOUR.—Where an estate is acquired by one of four brothers co-parceners, either with the aid of the joint funds, or with the personal aid of the brothers, two-fifths should be given to the acquirer, and one-fifth to each of the other three, 1 *S. D. A. R.* 6. But, according to the law as current in Benares, the fact of one brother having contributed personal labour, while no exertion was made by the other, is no ground of distinction. If the patrimonial stock were used, all the brethren share alike, 1 *Macn. Prins. H. L.* 52.

SELF-ACQUISITIONS WITHOUT AID OF JOINT FUNDS.—If the joint stock have not been used, he by whose sole labour the acquisition has been made, is alone entitled to it. It may, indeed, be difficult at times to determine what constitutes a joint stock in consequence of the difficulty of laying down any general rule that can with propriety be applied to any case. Each must, therefore, be decided upon its own merits, 1 *Stra. H. L.* 214.

EXCEPTION IN CASE OF LAND, THE RECOVERY OF WHICH ENTITLES ACQUIRER TO A FOURTH OVER AND ABOVE HIS OWN.—Where landed property, lost to the family, may be recovered by a co-heir without aid from the family resources, and made avilable to them, the recoverer is entitled to a fourth of such property, over and above his own, as a special remuneration, and the rest is divisible among himself and the other co-heirs, *Sankha*, *Mitac.* ch. i. s. iv. § 3;

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2 *Macn. Prins. H. L.* 157. *Sir Thomas Strange*, 1 *H. L.* 220, says, Whether by this is to be understood a fourth of the whole property recovered, or only a fourth of an equal share added to a share, seems uncertain. It has been held, that if lands are acquired by the labour of one co-parcener, and partly by the funds of another, each is entitled to half a share, but if they were acquired by the joint labour and capital of one, and by the labour only of the other, two-thirds should belong to the former, and one-third to the latter; but there is hardly any principle of Hindoo law to support this.

The acquirer takes a double share on partition where ancestral property has been used in making the acquisition, 2 *Macn. Prins. H. L.* 158.

Yautuca.—Land purchased for a boy by means of his yautuca is not liable to partition. Yautuca signifies anything received at the time of marriage. The term is generally used to signify donations given at the time of each of the sanscaras or ceremonies, 2 *Macn. Prins. H. L.* 159.

An united half-brother shall not participate in the self-acquisitions of his co-proprietor.—Two half-brothers lived together in unity, one of them, without separation, went to a foreign country, where he obtained a situation, and purchased lands. According to the doctrine contained in *Jim. Vahana* and other law books, the brother of the half-blood has no title to participate in the property, from the circumstance of his continuing with the acquired as a member of a joint and undivided family when the acquisition was made, 2 *Macn. Prins. H. L.* 161.

Improvement of undivided property.—Money expended in the improvement or repair of undivided property enjoyed by a Hindoo family in common, is spent on behalf of all the members alike, and all partake of the benefit arising from the outlay, should a division take place.

Agreement between members respecting expenditure of self-acquired funds.—There is no rule of Hindoo law precluding one member of an undivided Hindoo family, though living together, from entering into an agreement with his co-proprietors for the repayment of self-acquired funds which had been expended on the improvement or repairs of the family property, particularly where portions of it have been occupied by each of the members living separately, *Muttusvami Gaundan* v. *Subbiramaniya Gaundan*, 1 *Mad. H. C. R.* 309; and see 1 *Stra. H. L.* 199; 2 *Macn. P. H. L.* 162; 6 *Moore's In. Ap.* 547.

This suit was brought for a division of family property. The plaintiffs and defendants were members of an undivided family. They occupied separate houses and separate portions of the lands which comprised the family estate. The defendants set up an agreement, executed in 1858 by the plaintiffs, stipulating that no division of the lands should take place until the plaintiffs had

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reimbursed the defendants for the improvements made by the defendants' father upon that portion of the lands which was in their occupation, and providing for the adjustment of the value of the improvements by arbitration.

The District Munsiff dismissed the plaintiff's claim. His judgment, however, was reversed by the Principal Sadr Ameen, on the ground that the family were undivided, and that a charge incurred by one member must be held to be on behalf of the entire family. From this decision there was an appeal to the High Court, and *Scotland, C. J.*, in delivering judgment, recognised the rule upon which the Principal Sadr Ameen acted; but said, There is no rule of law of which we are aware that precludes one member of an undivided Hindoo family, though living together, from entering into an agreement with his co-parceners in respect of the expenditure upon the family property, and repayment of self-acquired funds; and such an agreement is rendered more reasonable and probable where portions of the family property are occupied and enjoyed, as in this case, by each of the members living separately.

Benamee purchase by a member of a joint family does not render the property self-acquired.—The presumption of Hindoo law in a joint undivided family, is that the whole property of the family is joint estate, and the *onus* lies upon a party claiming any portion of such property as his separate estate to establish that fact, *Dhurm Dass Pandey* v. *Mt. Shama Soondri Dibiah*, 3 *Moore's In. Ap.* 229; *Gopeekrist Gosain* v. *Gungapersaud Gosain*, 6 *Moore's In. Ap.* 53.

Where a purchase of real estate is made by a Hindoo in the name of one of his sons, the presumption of the Hindoo law is in favour of its being a *benamee* (*i.e.*, a purchase by the father in another's name for his own benefit) purchase, and the burden of proof lies on the party in whose name it was purchased, to prove that he was solely entitled to the beneficial interest in such purchased estate. Purchase of a *talook* in Bengal by a Hindoo in his eldest son's name, the conveyance, though in the English form of lease and release, was held to be a *benamee* purchase, and the son in whose name it was purchased, declared to be a trustee for the father, and the talook, part of the father's estate at the time of his death, *Gopeekrist Gosain* v. *Gungapersaud Gosain*, 6 *Moore's In. Ap.* 53.

"It is a practice prevalent in India to make purchases in the name of others, and from whatever cause or causes the practice may have arisen, it has existed for a series of years, and these transactions are known as *benamee* transactions. They are noticed at least as early as the year 1778 in *Mr Justice Hyde's Notes*, where, in a case that came before him in that year, *Doe d. Telluck Seal* v. *Gour Hung Day*, *Morten's Decs.* 249, the practice is thus mentioned: 'In mere personal demands, such as Bengal bonds, the Courts have, upon consideration, determined that the action may be

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brought in the name of the person whose name is in the instrument, though it should be proved that he had no real interest in it; and the Court has so far complied with the very general practice in this country of using the name of other persons in mere personal demands, that in many cases the plaintiff had recovered on notes, not in his own name, but in some other name, giving evidence that the transaction was really his. Such, for instance, that the money lent was his, and that he took the bond in the name of another.' Then he speaks thus in reference to real estate: 'But it cannot be allowed to be both ways in the case of a dispute of land, without directly contradicting those former decisions of the Court.'"

In a much more recent case, which occurred in *Sir Ed. Ryan's* time, *Maha Ranee Bussnutt Comaree* v. *Bullabdeb*, reported in *Fulton*, 383, it is said, "As far as the evidence goes, for there was no proof of the deed, the transaction is a simple *benamee* one, in the name of the complainant, but in truth for the benefit of *Rajah Tezchunder*. It may be for religious purposes, but the question raised, Whether the Court will recognise a *benamee* trusteeship, or a trust upon a trust does not arise. It being once established, then, that the transaction is *benamee*, the circumstance of the receipts being in the name of the complainant proves nothing, that being in accordance with *benamee* usage, *Amanee Tewaree* v. *Rai Rughoo Buns Suhai*, 3 *Beng. S. D. R.* 363; *Dhurm Das Pandey* v. *Mt. Shama Soondri Dibiah*, 3 *Moore's In. Ap.* 229, where *Lord Campbell*, in delivering the opinion of the Court, at p. 240, says, We have heard from the highest authority, the authority of *Sir Ed. East* and *Sir Ed. Ryan*, that the criterion in those cases in India is to consider from what source the money comes with which the purchase money is paid. Here there has been no evidence given that the appellant had any separate property, or that it was from his funds that any part of the purchase money was paid; therefore, I think that so far on this part of the case no difficulty can be entertained, and that the whole of the property must be considered as joint property, and it makes no difference whether the transaction was effected in the name of a son or a stranger. The rule of English law does not apply; various reasons may be urged against the abstract propriety of that rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase by one man in the name of another, to be for the benefit of the real purchaser. Their lordships, therefore, are not prepared to act against the general rule even in the absence of peculiar circumstances. But in India there is what would make it particularly objectionable, namely, the impropriety and immorality of making an unequal division of property among children."

After citing a passage from *Macn. P. H. L.* p. 2, their lordships add, "It is their opinion, therefore, that notwithstand-

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ing the respondent was the only son of Geogoram Gossain when the purchase was made, the objection in point of morality and religion was a circumstance of conduct so strong, according to Hindoo principles, that it is not lightly to be assumed; it forms an objection against importing into the Hindoo law, that rule of positive law which exists in England. I have omitted to observe that *benamee* purchases in the names of children, without any intention of advancement, are frequent in India," *Amanee Tewaree* v. *Rai Bughoo Buns Suhai*, 3 *Beng. S. D. A.* 336, where may be found this statement, "The present case does not appear to be at all of a nature with these *benamee* transactions, which are prohibited by the regulations, as Sheo Suhai in making the purchase in the name of his eldest son, acted only in conformity to the general usage and custom of the country, against which the prohibitory enactment was never intended to apply."

FRAUDULENT CONCEALMENT OF COMMON PROPERTY.—Effects which have been withheld by one co-heir from another, and which are discovered after the separation, let them again divide in equal shares. This is a settled rule, *Yajnavalchya*, *Mayukha*, ch. iv. s. vii. § 24; see *Mitac.* 293, ch. i. s. ix. § i.; *Jim. Vahana*, 230, ch. xiii. § 3; 3 *Dig.* 397. *Menu** says,—"When any common property whatever is brought to light after partition has been effected, that is not a [fair] partition, it must be even made over again," *Mayukha*, ch. iv. s. xxvi. § 26.

When *before* a division a member conceals or removes a part of the family property with intent to defraud, he shall lose all share in the property when it is divided.

But should this fraud be committed *after* division, he will not be divested of his share, so that such acts bar the remedy, but not his right to the property which would fall to his share.†

Fraud alone, and not impiety, profligacy, &c., would bar inheritance in modern courts of law.

SECTION VI.

DISTRIBUTION OF SHARES.—1. BETWEEN FATHER AND SONS. 2. BETWEEN CO-HEIRS.

1. *Between father and sons—Equal distribution of ancestral property rule of all schools—In Madras, sons may demand partition and take* per stirpes—*In Benares school, unequal distribution is pro-*

* The text is not found in the institutes.

† On the death of the father, dissensions arising among his heirs, the collector took upon himself to attach the property. One of the sons entered the house and took away part of the property, and for this was convicted of burglary, for which fraudulent crime he was afterwards deprived by the *Sudr. Court*, on appeal, of any share in the property. The law, or justice, of this decision is not apparent to ordinary minds.

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hibited of ancestral property, and of immoveable self-acquired property—He may reserve two shares of personal acquisitions—Inequality in shares of real property illegal—In Eastern India, equal partition—In Bengal, unequal distribution—According to Macn. Cons. *if once made valid—This opinion discussed and refuted—Opinions of old authorities—Father and only son—Doctrine of the* Mitac. *as to equal participation of father and son, and the right of the latter to require partition rejected—As to self-acquired property—By use of patrimony—Lost property acquired by sole exertions—Sons may dispute unequal division—Each son may demand his share at different periods, or may renounce—May resume share in case of indigence.*

2. *Distribution among co-heirs—Ancient rule—Equal division—Sons take* per capita*—Others than sons take* per stirpes*—Partition after the father's death—Disproportionate enjoyment—The co-heirs are not called upon to deduct their legitimate expenses—Division made of balance—A division is made of the balance after deducting expenditure—But extravagant excesses may be deducted from him who indulges in them—Drones not allowed to share in accumulations—Sons take* per capita*—Other than sons take* per stirpes*—One son requiring partition, no exception to rule as to equality of shares—Among sons of different brothers is according to their fathers—One of four grandsons' co-heirs having died, his son is entitled to claim partition from his uncles—As to separate acquired property brothers may contract with eachother—Brother's sons also share with their uncles as far as the great-grandson—The son of a great-grandson will not take, being in another line of heirs, unless the direct line is exhausted —This refers to re-united family only—This limitation is intended in the case of residence in another district—Distribution among mothers—But not where the sons vary in number—Property descends in co-parcenery—Several sons take as one heir—Exception in favour of crown, &c.—Condition of undivided family previous to partition—Manager—Acts must be for general good—When acts, for support of family, joint property bound, though remedy personal—Where, for purposes of trade or charity, consent of the rest necessary—Mortgage, &c., without consent of the rest, invalid—In Bengal, good for his own share—Consent of co-sharers necessary to valid alienation of joint property beyond alienor's shares—In Bengal, assignment of co-sharer's own share even before partition—In Madras, co-sharer may alienate his share which is liable to be sold under a fi. fa. on judgment obtained for a tort.*

EQUAL DISTRIBUTION OF ANCESTRAL PROPERTY RULE OF ALL SCHOOLS.—1st, Between father and sons; 2d, Between co-heirs. The rule (which is alike binding according to the doctrine of every school) is, that as to ancestral property, whether real or personal, land or moveables, the division must be strictly equal, *Daya Krama Sangraha*, ch. vi. § 18; *Mitacshara*, ch. i. s. v. § 5; 2 *Macn.*

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Prins. H. L. 47. "In wealth acquired by the grandfather, whether it consist of moveables or immoveables, the equal participation of father and son is ordained," *Brihaspati*, *Jimuta Vahana*, ch. ii. § 50. The meaning is, that the participation shall be equal and uniform, and the father is not entitled to make a distribution of greater or less shares at his choice, as he may do in the instance of his own acquired goods. It does not imply that the shares must be alike, *Jimuta Vahana*, ch. ii. § 50. Probably this means that it is not imperative, that each individual should receive the same class of property.

IN MADRAS SONS MAY DEMAND PARTITION AND TAKE PER STIRPES.—In Madras it has been held, as we have seen, that a son, or even a grandson of his own pleasure, may compel a division of ancestral immoveable property. Each of the latter stands as to his share in the exact position of the person he represents, (his father,) *i.e.*, he gets the share that would have fallen to him if he had claimed a division.

IN BENARES UNEQUAL DISTRIBUTION OF ANCESTRAL AND IMMOVEABLE SELF-ACQUIRED PROPERTY PROHIBITED.—In the Benares school an unequal distribution by the father of *ancestral* property, of whatever description, as well as of *immoveable* property *acquired by himself* is prohibited; and of his own personal acquisitions he cannot, according to the same law, reserve more than two shares for himself, and any unequal distribution of real property is illegal, for the maxim, *factum valet*, does not apply in the Benares school, 1 *Macn. Prins. H. L.* 44.

According to *Sir Thomas Strange*, 1 *H. L.* 196, relying on the old Bengal authorities, (and *Mr Strange*, who relies upon his father, *Man. H. L.* § 249,) the father has a right to two shares for himself out of the ancestral property. But the other rule, as laid down by *Mr Strange's M. H. L.* § 249, prevails in Southern India, and it is laid down in the *Mitac.* ch. i. s. v. § 5, "A father has no right to a double share."

Ancestral property is equally divided between a father and his sons in Eastern India, 2 *Macn. P. H. L.* 147.

In the Bengal school the father may make unequal distribution of self-acquired property as well as moveable ancestral property, 1 *Macn. Prins. H. L.* 44, and of property of whatever description recovered by himself, retaining for himself as much as he pleases, and should he make an unequal distribution, or without any just cause exclude any of his sons, the act would be sinful, but not invalid. But with regard to ancestral immoveable property and estate, to the acquisition of which his sons may have contributed, they are entitled to equal shares, but the father may retain a double share of it as well as of acquisitions made by his sons, 1 *W. H. Macn.* 44.

ACCORDING TO MACN. CONS. IF ONCE MADE, VALID.—*Macnaghten in Considerations on H. L.* ch. "Gifts unequal distribution" in

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discussing the subject with reference to the Bengal law, which he admits is surrounded with difficulty, arising from conflicting opinions, is evidently biased in favour of the opinion that a gift of even the entire ancestral moveable property, if once made, is valid though sinful.

THIS OPINION DISCUSSED AND REFUTED.—*Macn.* (*Prins. H. L.* 45,) differs from this view, first, Because the doctrine for which I contend has been established by the latest decision, 2 *S. D. A.* 214, and, secondly, Because the only authority for the reverse of this doctrine consists in the following passages from *Jim. Vahana*, "The texts of *Vyasa* exhibiting a prohibition are intended to show a moral offence; they are not meant to invalidate the sale or other transfer. Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one, but the gift or transfer is not null, for a fact cannot be altered by one hundred texts;" and the learned author adds, "If these passages are to be taken in a general sense, if they are to be held to have the effect of legalising, or at least of rendering valid all acts committed in direct opposition to the law, they must have the effect of superseding all law, and it would be better at once to pronounce those texts alone to be the guide for our judicial decisions. The example adduced by the commentator to illustrate these texts clearly shows the spirit in which this unmeaning though mischievous dogma was delivered; he declares that a fact cannot be altered by a hundred texts, in the same manner as the murder of a Brahmin, though in the highest degree criminal and unlawful, having been perpetrated, there is no remedy; or, in other words, that the defunct Brahmin cannot be brought to life again. . . . . But what renders this conclusion less disputable is, that the texts of *Vyasa* in question occur in the chapter of the *Daya Bhaga*, which treats of self-acquisitions, and has no reference to ancestral property. If any additional proof were wanting of the father's incompetency to dispose of ancestral real property by an unequal partition, or to do any other act with respect to it which might be prejudicial to the interests of his son, I would merely refer to the provision contained, ch. iii. s. vii. § 10, of the translation of the extract from the *Mitacshara* relative to judicial proceedings. The rule is in the following terms:—"The ownership of the father and son is the same in land which was acquired by his father," &c. From this text it appears that in the case of land acquired by the grandfather the ownership of father and son is equal, and therefore if the father make away with the immoveable property so acquired by the grandfather, and if the son has recourse to a court of justice, a judicial proceeding will be entertained between the father and son. The passage occurs in a dissertation as to who are fit parties in judicial proceedings, and although the indecorum of a contest wherein the father and son are litigant parties has been expressly recognised, yet, at the same time, the rights of the son are de-

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clared to be of so inviolable a nature that an action by him for the maintenance of them will be against his father, and that it is better there should be a breach of moral decorum than a violation of legal right.

The question as to the extent to which an unequal distribution made by a father in Bengal should be upheld has been amply discussed in a case decided in the Court of *S. D. A.* (2 *S. D. A. R.* 214) in 1816. It was there determined that an unequal distribution of ancestral immoveable property is illegal and invalid, and that the unequal distribution of property acquired by the father, and of moveable ancestral property, is legal and valid, unless when made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. It was declared, in a note to that case, that the validity of an unequal distribution of ancestral immoveable property, such as is expressly forbidden by the received authorities on Hindoo law, cannot be maintained on any construction of that law by *Jimuta Vahana* or others. *Jagannatha*, in his *Digest*, maintains a contrary opinion. He says, that if a father infringing the law absolutely give away the whole or part of the immoveable ancestral property, such gift is valid, provided he be not under the influence of anger or other disqualifying motive; and admitting this doctrine to be correct, it must be inferred, *à fortiori*, that he is authorised to make an unequal distribution of such property, but the reverse of this doctrine has been established by the mass of authorities, which will be found collected in the case above quoted, 1 *Macn. P. H. L.* 45.

Opinions of old authorities—Father entitled to two shares of ancestral property.—When a father makes a partition of the ancestral property, he may take two shares for himself, and allot to each of his sons a single share; for the text of *Vrihaspati*, which declares "the father may himself takes two shares at a partition made in his lifetime," relates to ancestral wealth, *Daya Krama Sangraha*, ch. vi. § 16. It must not be supposed that this text refers to the father's own wealth, since it would contradict the texts of *Vishnu* and the rest, which declare that what a father may in such case take depends entirely upon his own will, and as he may take a greater or less share, at his pleasure, the restriction of two shares only would be useless, *ib.* § 17.* A father has not the power to make an unequal distribution of ancestral property, consisting either of land, or a corrody, or slaves, even though any of the causes before mentioned, namely, the superior qualifications of one particular son, &c., should exist, and the text of *Yajnavalchya*, which declares "the ownership of the father and son is the same in land which was acquired by his father, or in a corrody, or in chattels," (slaves,) is intended to restrain the exercise of the father's will; for, although

* See *Macn.* opinion, *ante*, p. 370, where this subject is discussed, and the correct rule laid down.

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contrary to the received opinion, [of equal ownership between father and son,] it is impossible that as long as the father, the owner of the ancestral property, continues to survive, his sons should have ownership therein, *ib.* § 18.

But the father possesses a power in regard to ancestral property other than land, (and the descriptions above mentioned,) such as pearls, gems, similar to that which he has in the disposal of his own acquired wealth. *Yajnavalchya* declares, "The father is master of the gems, pearls, and corals, and of all [other moveable property,] but neither the father nor the grandfather is so, of the whole immoveable estate," *ib.* § 19.

Here, by the specification, in the first instance, of gems, pearls, and corals, and afterwards by the use of the word *all*, gold and other effects, exclusive of the three descriptions of property, consisting of land, &c., are intended. The word *whole*, again, which occurs in the second portion of the above text, is made use of for the purpose of showing that a prohibition does not exist against a gift of immoveable property not incompatible with the due support of the family. Thus it is stated in *Daya Bhaga*, *ib.* § 20.

In like manner, a father may at his pleasure allot to his son the deduction of a twentieth from his own acquired wealth, or to the ancestral property. *Yajnavalchya* says, "If a father make a partition, let him separate his sons at pleasure, and either dismiss the eldest with the best share, or, if he choose, all may be equal sharers." Here the first half of this text relates to a father's own acquired wealth, and the last refers to ancestral property. This is the opinion stated in the *Daya Bhaga*, *Daya Krama Sangraha*, *ib.* § 21.

FATHER AND ONLY SON.—*Narada*, 13, 12, allows a double share to a father, but this has been explained to relate to an only son, *Mayukha*, ch. iv. s. iv. § 12; *Jim. Vahana*, ch. ii. § 35. *Vrihaspati* declares, however, that the father is entitled to only an equal share with an only son in ancestral property, *Mayukha*, *ib.* § 13; *Jim. Vahana*, ch. ii. § 35; so *Yajnavalchya*. For the ownership of the father and son is the same in land which was acquired by the grandfather or in a corrody* or in chattels, (which belonged to him,) *Mayukha*, *ib.* § 13; *Mitac.* ch. i. s. v. § 3; *Jimuta Vahana*, ch. ii. § 9. So *Katyayana*, when the father and the sons even take all that which has been made upon the common wealth, in equal shares, it is called a legal partition, *Mayukha*, ch. iv. s. iv. § 13. A text in *Yajnavalchya*, and another in *Narada*, to a contrary effect have been explained as relating to former ages, *ib.* § 14, "or the meaning of the text (*Yajnavalchya supra*) may be as set forth by *Dhareswara*." A father occupied in giving allotments at his pleasure has equal ownership with his sons in the paternal grandfather's estate. He

* A corrody signifies anything which has been promised, deliverable at any fixed period, *Jim. Vahana*, ch. ii. n. 13.

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is not privileged to make an unequal distribution of it at his choice, as he is in regard to his own acquired wealth. So *Vishnu*, 17, 1, 2, says, When a father separates his sons from himself, his will regulates the division of his own acquired wealth. But in the estate inherited from the grandfather the ownership of father and son is equal, *Jimuta Vahana*, ch. ii. § 16, 55, 76. This is very clear, "When the father separates his sons from himself he may, by his own choice, give them greater or less allotments if the wealth were acquired by himself; but not so, if it were property inherited from the grandfather. The father has not, in such case, an unlimited discretion," *ib.* § 17.

THE DOCTRINE OF THE MITACSHARA AS TO THE EQUAL PARTICIPATION OF FATHER AND SON, AND THE RIGHT OF THE LATTER TO ACQUIRE PARTITION REJECTED.—Hence (since the text becomes pertinent, by taking it in the sense above stated, or because there is ownership restricted by law in respect of shares, and not an unlimited discretion) both opinions, (of the *Mitacshara* and others, *Srikrishna* and *Achyuta*,) that the mention of like ownership provides for an equal division between father and son in the case of property ancestral, and that it establishes the son's right to require partition, ought to be rejected, *Jim. Vahana*, ch. ii. § 18. It is consequently true (since the texts above cited do not imply co-ordinate ownership) that the father has his double share of wealth inherited from the grandfather or other ancestor, and that a distribution takes place at the will of the father only, and not by the choice of his sons, *ib.* § 20; see *Srikrishna*, *Chudamani*, and *Achyuta*, *ib.* n. 20.

AS TO SELF-ACQUIRED PROPERTY.—As to self-acquired property, whether his sons co-operate or not in its acquisition, although the disposition of it is more in the discretion of the father, he must not make distinctions in its distribution upon improper or arbitrary grounds, or from caprice, as for instance on behalf of the issue of a favourite wife, nor when the father's mind is labouring under disqualifying influences, such as anger, sickness, &c., *Menu*, ch. ix. § 215, *Jim. Vahana*, ch. ii. § 74, 76, 83, 86, note; *Narada*, 2 *Dig.* 541; 3 *ib.* 2; *Daya Krama Sangraha*, ch. vi. § 14, 15; *Bhowannychurn Bunhoojea* v. *Heirs of Ram Kaunt B.*, 2 *S. D. A.* 202; 3 *Dig.* 544; 1 *Stra. H. L.* 194; 2 *ib.* 317; and *Katyayana*, 2 *Dig.* 540; *Macn.* pp. 4, 5.

This restriction on his volition in the distribution of it, is incompatible with the doctrine that he can do with it as he pleases, *ante*, pp. 354, 358, 363, 369. Bengal authorities only are quoted in support of it. As to the Mithila law, see 2 *Stra. H. L.* 317.

PROPERTY ACQUIRED BY USE OF PATRIMONY.—It will be borne in mind that although property may have been self-acquired, yet if it were obtained by the father at the expense of ancestral wealth, or if the patrimony were used in its recovery; it enters into the category of that class of property, and is regarded as such, *ante*, pp. 355, 356, 361.

LOST PROPERTY ACQUIRED BY SOLE EXERTIONS.—While, on the

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other hand, property which was ancestral, but which had been lost by the ancestor, and was recovered by the son at his sole expense, without the use of ancestral property, is regarded as self-acquired, *ante*, pp. 346, 351, 357.

SONS MAY DISPUTE UNEQUAL DIVISION.—Should any other principle be adopted in the distribution without the concurrence of the sons, it may be disputed by them, for the sons have the power of resisting an unequal distribution as well as of claiming division, 1 *Stra. H. L.* 195.

EACH SON MAY DEMAND HIS SHARE AT DIFFERENT PERIODS.—We have seen, pp. 317, 328, that a division, at the instance of some of the sons, may take place, 1 *Stra. H. L.* 194; in that case the other sons may, at any time, require a distribution of their shares, *ante*, p. 328.

OR MAY RENOUNCE.—But should a son not be desirous of participation, he may waive his right to a share by acceptance of a trifle in satisfaction. *Yajnavalchya* 2, 117, 3 *Dig.* 65, says, "The separation of one who is able to support himself, and is not desirous of participation, may be completed by giving him some trifle which will have the effect of binding his heirs who might, without renunciation, still claim partition," *Menu*, ch. ix. § 207; *Mitac.* ch. i. s. ii. § 11, 12. *Jim. Vahana*, ch. iii. s. ii. § 28; *Mayukha*, ch. iv. s. iv. § 16; 1 *Stra. H. L.* 195.

MAY RESUME SHARE IN CASE OF INDIGENCE.—It is said the father may resume, in caseof indigence, what he had so shared with his sons; 1 *Stra. H. L.* 196; 2 *Dig.* 536. The correctness of this last rule is doubtful. There is no case in English law where a gift, the possession of which passes at the time to the donee, has been resumed.

2. BETWEEN CO-HEIRS.—We have now to treat of the division of property after the death of the father amongst the co-heirs; but before passing on, we shall pause for a moment to take a bird's-eye view of the state of a Hindoo family previous to partition. In Hindoo law, the presumption is in favour of union, as the primary state of every Hindoo family is that of association, *Dhurm Dass Pundey* v. *Musst. Shama Soondri Debiah*, 3 *Moore's In. Ap.* 229; 1 *Stra. H. L.* 225. On the death of the father undivided, the ancestral property devolves upon the co-heirs undivided, and so long as they remain in that, the normal state of a Hindoo family, they enjoy community of interest, although the management of the family concerns may devolve upon one member thereof. The eldest son generally having the first claim, but his pretensions are subject to the concurrence of the rest, and to his character and habits of business. On that male member of the family (except in *Malabar* and *Canara*, where the female is preferred, and even there a male member is manager) in whom these qualifications unite, the management falls, *Jim. Vahana*, ch. i. s. 36, 37; ch. iii. s. i. § 15; 2 *Dig.* 533; 1 *Stra. H. L.* 199; 2 *ib.* 252.

ANCIENT RULE.—It is unnecessary here to do more than refer to the ancient rule with regard to the assignment of shares into

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twentieths, fortieths, and eightieths amongst the eldest, middlemost, and youngest, and the right of the eldest son to the least chattel, &c. These rules being now obsolete, the utmost benefit that could result from their discussion would be to satisfy antiquarian curiosity; and those who are disposed to study the subject more fully will find it treated at great length in the different treatises on inheritance by *Jimuta Vahana* and others.

EQUAL DIVISION.—The rule that now prevails is that among the sons the partition must be equal. The mode by equal division is the only one adopted in the present age, because younger brothers are now-a-days seldom met with who entertain this great veneration (referring to an additional share) for the eldest son, and elder brothers deserving of it are (equally) rare, *Daya Krama Sangraha*, ch. vii. § 13; *Mayukha*, ch. iv. s. iv. § 11; *Mitac.* ch. i. s. iii. § 7; *Jim. Vahana*, ch. iii. s. ii. § 27.

We have elsewhere observed, under the head of "Charges on the Inheritance," pp. 77, 325, that the debts and other charges must be provided for before partition, 1 *Stra. H. L.* 191, 192. These of course can only be ascertained on settlement of the accounts of the family, and division of the liabilities among the co-heirs, 2 *Stra. H. L.* 283, *Coleb.*, or by special allotment of the property to meet the demand, as when provision of maintenance is in question. But this is mere matter of private arrangement, and cannot oust the creditors of their right to follow the property, notwithstanding its partition. If the enjoyment have been disproportionate, the co-heirs are liable to account for it, 2 *Stra. H. L.* 394, *Coleb.* We have also seen, under the head of "Disqualifications for Inheritance," p. 98, that there are certain moral, physical, and mental defects, which, as they exclude from the performance of obsequies, likewise exclude from inheritance. Making allowance for these, the division of both ancestral and acquired property must in general be equal, without deductions for the eldest son. *Harita* ordains equal distribution without deduction. *Usanas* says, "The distribution among brothers born of women of the same tribe is ordained to be made equally." *Paithinasi* says, "When the paternal inheritance is to be divided, the shares shall be equal." *Yajnavalchya* also declares, "Let the sons divide equally the effects and the debts after the death of both parents." Where deductions take place, it can only be by consent of the brethren, *Jim. Vahana*, ch. iii. s. ii. § 25, 26; *Mitac.* ch. i. s. iii. § 4; *Daya Krama Sangraha*, ch. vii. § 13.

PARTITION AFTER THE FATHER'S DEATH.—An equal partition after the death of the father is declared in another *Smriti*, (*Yajnavalchya*, 2, 118; *Mitac.* ch. i. s. iii. § 1; *Jim. Vahana*, ch. iii. s. i. § 4; 3 *Dig.* 78.) Let sons divide equally both the effects and the debts after (the demise of) both parents, *Harita.* When the father is dead, the partition of the inheritance should be made equally, *Mayukha*, ch. iv. s. iv. § 17; *Stra. M. H. L.* § 250.

DISPROPORTIONATE ENJOYMENT.—The enjoyment of common

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property in disproportionate or unequal shares—some of the co-heirs having more, some less, of the shares when divided—must nevertheless be equal, the law taking no account of greater, or less expenditure, unless the difference be such, as to exclude all idea of proportion, the object entirely selfish, or the circumstances of a kind to include fraud, 1 *Stra. H. L.* 224.

THE CO-HEIRS ARE NOT CALLED UPON TO DEDUCT THEIR LEGITIMATE EXPENDITURE.—Whatever excess has been expended by one brother, in consequence of his having a large family, should not be taken into account at the time of partition, but a partition should be made of the wealth which is actually forthcoming, *Daya Krama Sangraha*, ch. vii. § 29. *Narada* declares: "Among unseparated kinsmen, let not one restore what has been expended." A partition should take place of the visible wealth collected for income and expenditure, *ib.* § 30.

THE DIVISION IS MADE OF THE BALANCE AFTER DEDUCTING EXPENSES.—Having compared the amount of the wealth which had accumulated at the time when no partition had taken place with the amount expended, a division should be made of the balance actually remaining, *ib.* § 31; so what has been laid out, with prudence and without excess, on initiation of a son, or the nuptials of a daughter, are not to be accounted for, for these are charges upon the joint wealth, *ib.* 32; 1 *Stra. H. L.* 224, *ante*, p. 78.

BUT EXTRAVAGANT EXCESS MAY BE DEDUCTED FROM HIM WHO INDULGES IN IT.—But if there have been extravagant excess at these ceremonies, to the detriment of the common fund, the co-heir indulging in such extravagance will receive his share diminished in proportion to such excess; though, if the debt incurred exceed his share, it is said that the law does not direct that the excess shall become a debt, 1 *Stra. H. L.* 224, *ante*, p. 83.

DRONES NOT ALLOWED TO SHARE IN ACCUMULATIONS.—In Bengal, a lazy knave, or drone, may be deprived of participating in the property acquired by augmentation or improvement. But this rule does not extend to Southern India. *Jagannatha* says: "Should any one of undivided brothers, through laziness or knavery, make no exertion for gain, not striving to improve the existing stock, and acquire further wealth, by agriculture, or the like, he may be debarred from his share of that which has been added by the rest of the brethren; subject to a trifle being given him for his maintenance, and without prejudice to his claim for a share of the original stock." But in Southern India this is denied—there being no exception there, to the right of sharing, all participating equally, without reference to their contribution to the common stock, except in the one case only—viz., with the consent of the co-heir, *Mitac.* ch. i. s. iv. § 31; *Menu*, ch. ix. § 207.

SONS TAKE PER CAPITA.—These shares are given to the sons, irrespective of their mothers; that is, whether they be by the same mother or not, they take *per capita*, 1 *Stra. H. L.* 193, 205.

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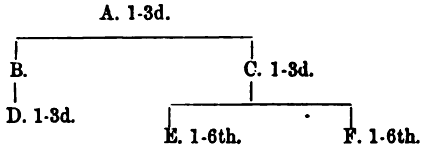
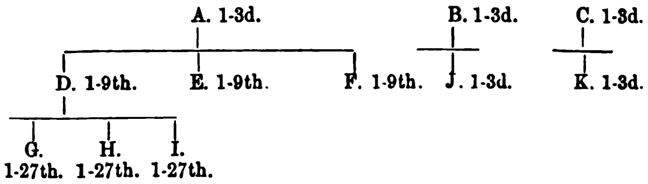
Their shares are not governed by the number of the mothers from whom they have sprung, *Stra. Man. H. L.* § 250; 1 *Stra. H. L.* 193, 205, not even among Soodras. The same rule of equality of share for sons prevails for all classes, *Judgment of Sudr. Court in R. A.* 20 *of* 1846, *Stra. Man. H. L.* 251.

OTHER THAN SONS TAKE PER STIRPES.—Where, however, other than sons claim a division, they inherit *per stirpes*—standing in the position of those through whom they derive their claim, and receiving amongst them all, only what he would have got had he divided. Thus: A. has two sons, B. and C.; B. has one son, D.; C. has two sons, E. and F.



Here A.'s property is divided into three shares. A. gets one share, one-third; one share, another third, claimable by B., goes to D.; and the other third share, claimable by C., goes to E. and F., one-sixth to each.



The property was originally divided amongst three brothers—A., B., C.; each takes a one-third share. A. leaves three sons, D., E., F., amongst whom he divides his one-third portion, which gives to each a one-ninth share. D. leaves three sons, G., H., I., who are likewise entitled to an equal division of D.'s one-ninth share, so that each would receive a twenty-seventh part. J. and K., B. and C.'s adopted sons, each take their adopted father's one-third share.

Again, A. B. and C. are brothers. A. dies, leaving a son, D., who claims and receives his father's one-third share of the property; B. and C. remain united. B. dies without issue, his share vests in C. The divided nephew, D., has no claim thereon. Had D. not divided off previously to the death of B., the whole of the family property would have been enjoyed in common by himself and C. But in consequence of his having divided on the death of B., C. takes the whole property on the death of B. as sole surviving member of a joint family.

The law says, "That on the death of a divided co-heir, after

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the enumeration of various classes of heirs, or failure of those of higher degree, brothers of the whole blood take the inheritance in the first instance; if there be none, then brothers by different mothers, and on failure of brothers of either class, brother's sons share the heritage in the order of their respective fathers; but brother's sons, or nephews have no title to the succession during the existence of their uncles," *Mitac.* ch. ii. s. iv. § 5–8. We have not seen this doctrine applied to claims to succession of the nature of the case we had supposed; for instance, if D. had not been a divided nephew, and had been living in union with B. and C. at the period of B.'s death, the question might be raised, whether he was entitled to share the whole of the property equally with C., or whether he ought not to be restricted to the share of his father, A. and C. taking the share of B., or two-thirds of the whole paternal inheritance. We do not recollect of any case wherein the question has been raised; but, certainly, consider this one likely to arise. *Jim. Vahanna* agrees with the Benares school in respect to the succession of a brother to the share of his deceased separated brother, *Stoke's H. L. B.* 352, n.

One son requiring partition, no exception to rule as to equalty of shares.—It can hardly be considered an exception to the rule of equality of shares that any one son may, in exclusion of the rest, be its sole object, the rest of the family and the property remaining in union with the father as before; for such son, on separation, can only receive his due share, 1 *Stra. H. L.* 194.

Amongst sons of different brothers is according to their fathers.—*Yajnavalchya* declares the mode of division of ancestral estate among the sons of different brothers:—"Among grandsons by different fathers the allotment of shares is according to the father's." It means, that if there be one son of one, two sons of a second, and three sons of a third, [or the like,] their shares will be solely according to the number of the fathers, and not the number of the sharers themselves, *Mayukha*, ch. iv. s. iv. § 20; see *Mitac.* 276, ch. i. s. v. § 1, 2; *Jim. Vahanna*, 60, ch. iii. s. ii. § 21, 22; 3 *Dig.* 6.

One of four grandsons, co-heirs, having died, his son is entitled to claim partition from his uncles.—The eldest of four brothers, who had received moveable and immoveable property by gift from their maternal grandfather, died, leaving a son, the complainant, and then their mother died. Afterwards two of the surviving brothers died, one leaving a daughter, who was mother of male issue, and the other a widow, as their heirs. A part of the property was undivided, another portion was divided, and in the exclusive possession of the several individuals specified. The complainant, the son of the eldest brother, sues for partition of the estate, and the defendant, one of the uncles, admitting the inchoate right of the plaintiff, states that while he is alive the brother's son cannot have an equal share with him. The question was, Is the

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property a fit subject of partition while one of the four brothers exists, or will the surviving brother be entitled to a superior portion? It was answered, All the grandsons were equally entitled to the gift of their maternal grandfather, and should one of them die during the life of the mother, leaving a son, his son has the exclusive right to the property to which his father was entitled, whether divided or undivided. The following is the doctrine of the *Mitac.*, *Jim. Vahana*, and other books of law, *Vrishaspati.* "All the brethren shall be equal sharers of that which is acquired by them in concert," 2 *Macn. Prins. H. L.* 150.

With regard to separately acquired property the brothers may enter into contracts with each other, *Stra. M. H. L.* § 239.

BROTHER'S SONS ALSO SHARE WITH THEIR UNCLES.—*Katyayana* says, "Should a younger son die before partition, his share shall be allotted (by the elder brother) to his son, provided he had received no fortune from his grandfather." "That son's son shall receive his father's share from his uncle, or from his [uncle's] son, and the same [proportionate] share shall be allotted to all the brothers according to law. Or [if that grandson be also dead] his son takes the share; beyond him succession stops." The *younger son* (anuja) denotes also that the eldest [is bound to portion off his brother's son,] stops at the great-grandson, *Mayukha*, ch. iv. s. iv. § 21. See 3 *Dig.* 7.

THE SON OF THE GREAT-GRANDSON WILL NOT TAKE, BEING IN ANOTHER LINE OF HEIRS, UNLESS THE DIRECT LINE IS EXHAUSTED.—We must thus understand it. "The son of the great-grandson, or the rest, will not on the death of the father, [grandfather, and great-grandfather, without interval, after the death of the great-great-] grandfather, obtain his wealth, being of another [line,] so long as his son or other [heirs] are alive. In default of a son, grandson, [and great-grandson,] in the general [family] only, he also will take [the succession,]" *Mayukha*, ch. iv. s. iv. § 22.

THIS REFERS TO A RE-UNITED FAMILY ONLY.—This does not refer to an undivided family, but to a re-united one. For it is said by *Devala*, "Partition of heritage among undivided parceners, and a second partition among divided relatives living together, [after re-union,] shall extend to the fourth in descent. This is a settled rule," and "Be it debt, or a written contract, or a house, or arable land, descended from his grandfather, he shall take his due share of it when he comes, even though he had been very long in a foreign country. If a man leave the common family and reside in a another province, his share must undoubtedly be given to his male descendants when they appear." It means between the great-great-grandfather and his sons, separated when in a state of union, and afterwards re-united, *Mayukha*, ch. iv. s. iv. § 23; see 3 *Dig.* 10; *ib.* 441; *Jim. Vahana*, 140, ch. viii. § 1, 2, 3. In both, the text is assigned to *Brihaspati.*

THIS LIMITATION IS INTENDED IN THE CASE OF RESIDENCE IN

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ANOTHER DISTRICT.—This refers to those fixed in the same district, because where they reside in different districts it will descend even to the fifth, as is declared by *Brihaspati* in treating of residence in other lands. "Be he the third person, or fifth, or even the seventh, [*i.e.*, in the second, or fourth, or even in the sixth degree,] he shall receive the share that gradually descends to him on full proof of his birth and family name," *Mayukha*, ch. iv. s. iv. § 24.

DISTRIBUTION ACCORDING TO THE MOTHERS.—*Brihaspati*, "If there be many [sons] sprung from one father, alike in number and in class, but born of rival mothers, partition must be made by them according to law, by the allotment of shares to the mothers." So *Vyasa* says, "If there be many sons of one man, by different mothers, but equal in number, and like by class, a distribution among the mothers is approved," *Mayukha*, ch. iv. s. iv. § 25. See *Jim. Vahana*, 57, ch. iii. s. i. § 12; 2 *Dig.* 575, 576.

BUT NOT WHERE THE SONS VARY IN NUMBER.—"Among brothers who are equal in class, but vary in regard to the number [of sons produced by each mother,] the shares of the heritage are allotted to the males, [not to their mother's,]" *Brihaspati, Mayukha*, ch. iv. s. iv. § 26.

PROPERTY DESCENDS IN CO-PARCENERY.—Wherever there are several sons they take, as one heir, the property descending to them as co-parceners, and they enjoy it in community under one manager, as we have seen, *ante*, pp. 220, 233, 243.

EXCEPTION.—There is, however, one exception to this general rule in favour of the crown. *Menu*, ch. ix. § 323, speaks of a dying king duly committing his kingdom to his son. But this rule is based upon usage rather than law, *Jagannatha*, 2 *Dig.* 121, 122. So the same exception extends to principalities and the great zemindaries. See *ante*, Inheritance, p. 243. *Beemlah Dibeh* v. *Goculneth, Beng. R.* 1805, p. 32; 1 *Stra. H. L.* 198, 208, 236; 2 *ib.* 167, 447; *Ramgunga Deo* v. *Doorgamunee Jobrai, Beng. R.* 1809; *Urjun Manie Thakoor* v. *Rumgunga Deo, Beng. R.* 1814, p. 469.

CONDITION OF UNDIVIDED FAMILY PREVIOUS TO PARTITION.—We have seen that the management devolves upon some male member of the family, where they continue to live in association, *Jim. Vahana*, ch. iii. s. i. § 15; 2 *Macn. Prins. H. L.* 148, n.

MANAGERS' ACTS IMPORTANT.—The manager regulates the dealings and transactions of the family, and his acts are of importance not only to the association, but also to the creditors. As to the power of manager or guardian to alienate ancestral property, see 6 *Moore's In. Ap.* 393, *ante*, p. 79. *Sir Thomas Strange, H. L.* 200, says, In his capacity as manager, all his acts and disbursements to be of validity must be for the general good, if not for the immediate and indispensable maintenance of the whole: for objects chargeable upon the common stock, including works of piety, which it concerns all should not go unperformed; with this difference, that where his acts have been for the support of the family, the charge

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is in its nature binding upon the joint-property, though the remedy may be eventually against him only, by whom it was incurred so acting; whereas, if in the course of trade, or for charitable purposes, in order to its being so, it must have had the consent of the rest express or implied, *Mitac.* ch. i. s. i. § 28, 29; 2 *Stra. H. L.* 336, 338, 339, 342.

It is important for creditors, therefore, to ascertain whether the family with whom they are dealing be separated, or united. It being necessary in the latter case to see that the transaction is one that will bind the co-heirs, otherwise the common stock will not be liable, *Prannath Das* v. *Calishunker Ghoosal, Beng. R. ante,* 1805, p. 51; *Sheva Dass* v. *Bishonath Dobee, ib.* 46. *Mr Colebrooke,* upon this point, says, That a mortgage, sale, or gift, by one of several joint-owners, without the consent of the rest, is invalid for others' shares. In Bengal law it is clear that it is good for his own share, and for that only, *Colebrooke* and *Ellis,* 2 *Stra. H. L.* 344; *Daya Krama Sangraha,* ch. xii. s. viii. ix.; 1 *Stra. H. L.* 201. But he would be liable to penal consequences, 1 *Stra. H. L.* 201, and the Court would probably enforce a separation in such case, 2 *Stra. H. L.* 431. In other provinces it as clear that the act is invalid as it concerns others' shares; *Mr Colebrooke* remarking, that the only doubt which the subtlety of Hindoo reasoning might raise would be, whether it be maintainable even for his own share, the property being undivided, 1 *Stra. H. L.* 201.

CONSENT OF THE CO-SHARERS NECESSARY TO VALID ALIENATION OF JOINT PROPERTY BEYOND THE ALIENOR'S SHARE.—I take the law to be that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint-property beyond the share of the actual alienor, and that an unauthorised alienation by one of the sharers is invalid beyond the alienor's share as against the alienee. But consent is implied, and may be presumed in many cases, 2 *Stra. H. L.* 343, 348; see 1 *Stra. H. L.* 201; *Mitac.* ch. i. s. i. § 30; 2 *Dig.* 519.

IN BENGAL ASSIGNMENT OF CO-PROPRIETOR'S OWN SHARE EVEN BEFORE PARTITION.—But in Bengal there may be an assignment of the co-proprietor's own share, even before partition, since a common property is already vested in him, *Jim. Vahana,* ch. ii. § 28, note; *Srikrishna's Daya Krama Sangraha,* ch. xi. § 2, 3, 7; 2 *Dig.* 104.

IN MADRAS CO-SHARER MAY ALIEN HIS SHARE WHICH IS LIABLE TO BE SOLD IN EXECUTION ON A JUDGMENT OBTAINED FOR A TORT.—According to Hindoo law, current in Madras, a member of an undivided family may alien his share of the family property, to which, if a partition took place, he would be individually entitled, and such share is liable to be sold in execution on a judgment obtained for a tort, *Virasvami Gramini* v. *Ayyasvami Gramini,* 1 *Mad. H. C. R.* 471.

This was an action for the recovery of two houses which the plantiff had purchased at a sale, by the sheriff of Madras, under a

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writ of fi. fa., to recover damages in an action of trespass against the defendant. One of the issues raised a question whether, assuming the houses to be the property of an undivided family, of which Virasvami and the defendants Ayyasvami and Devanne Ammal are members, the plantiff, by virtue of such sale, acquired any, and what title in the same.

Sir Colly Scotland, C. J., in delivering judgment said, For the defendants it was contended as a matter of law, that the sale by the sheriff passed no interest whatever in the family property; for that, even if it had been an alienation by Ayyasvami himself, without the consent of his co-parceners, such alienation would have been void and inoperative, even to the extent of his own share; and this being a sale upon an execution in an action of damages for a tort, was put as an *à fortiori* case, but we are of opinion that Ayyasvami might have made a valid alienation of his share and interest in the property, and that it passed under the sale in execution by the sheriff. As regards the supposed distinction where, as in the present case, the execution is for damages for a tort, we think that the damages and costs recovered constitute a judgment debt, and the right of the execution creditor thereunder is the same as upon any other judgment for the payment of money. To hold differently in this case would be in effect to declare the pecuniary immunity of all members of undivided Hindoo families, not possessing self-acquired property for any wrong, however great, which they may commit.

Mr Mayne, however, chiefly relied upon the general ground, that no alienation by a member of an undivided Hindoo family, without the consent of his co-parceners, can bind even his own share, and he asked our consideration of several decisions of the late Sadr Court upon this subject. It was not disputed that the course of decision in the late Supreme Court, since at least the case of *Ramasawmy* v. *Sashachella*, (2 *Strange*, *N. C.* ed. 1827, p. 74,) and the opinion expressed by *Mr Colebrooke*, in his observations upon that case, (2 *Stra. H. L.* 344,) supported the validity of such an alienation to the extent of the alienor's own share; nor that the same rule of law prevails in Bengal; but it was said that there is a foundation for the rule in Bengal, which does not exist, according to the Hindoo law, applicable to Madras, for that in Bengal, the share of each parcener is treated as separate, even before partition, though unascertained.

In support of this, the 31st section of the second chapter of the *Daya Bhaga* was referred to. But that section appears to be a quotation from *Narada*, and, according to *Mr Colebrooke's* note to the passage, it is otherwise interpreted by different compilers, and is generally understood as declaring the separate and independent right of co-heirs who have made a partition; and certainly the language of the passage itself refers to a condition of separation to some extent. But we do find in ch. ii. s. i. § 26, on the widow's

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right of succession, that the author, in course of a discussion upon the contradictory statements of text writers and commentators, makes the observation, that "is it not true that, in the instance of re-union, [and of a subsisting co-parcenery,] what belongs to one, appertains also to the other parcener, but the property is referred severally to unascertained portions of the aggregate? Both parceners have not a proprietary right to the whole." This observation, however, is used only in reply to the argument, that the preferable right of the surviving parceners may be deduced by inference from the fact that "the same goods which appertain to one brother belong to another likewise ;" and that "when the right of one ceases by his demise, those goods belong exclusively to the survivor, since his ownership is not divested." But, according to both schools of Hindoo law, the right of survivorship is not absolute, and the undivided share, according to both, descends to his sons ; and it seems to us that the real ground upon which the widow's right of succession is placed in *Daya Bhaga* is the authority of *Vrihaspati*, who says, that "a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased, half the body survives." Adding, by way of question, "How, then, should another take his property while half his person is alive?" So that the right in truth rests upon the oneness of husband and wife, and not upon the existence of a separate estate and interest of the husband in the property during his life. Such a separate estate, as a matter of inference, might be deduced as well from the descent of the father's undivided share to sons, which is common to both schools of law, as from its descent to his widow, which is peculiar to the Bengal school. It is further to be observed, that whatever distinction there exists in this respect, was certainly present to the minds of *Mr Colebrooke*, and of the judges who decided the cases above referred to.

It only remains for us to notice the Sadr Court decisions, to which our attention was called. We have looked at these cases, seven in number, and we find that three of them expressly decide that one of several co-parceners may bind his own share by alienation, and that it is liable for his individual debt. These are the decisions to be found at p. 222 of the reports for 1853 ; at p. 235 of reports of 1855, and at p. 247 of the reports for 1860, which is the latest case. There are, however, in the volume for 1860, two decisions in which the contrary is held. One of these, at p. 67, is rested upon the authority of the other at p. 17, and that again is rested upon the authority of the decision at p. 270 of the reports of 1859. Looking at that case, it does not seem to go the length supposed in the two last-mentioned cases ; for the judgment in terms recognises the power of the co-parcener to confer upon the purchaser a right to what might eventually fall to his share at division, and the suit being for the recovery of a specific portion of property

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upon an alleged division which was disbelieved, appears to have been properly dismissed. As to the decision at p. 215 of the reports for 1854, we need only say that the Court appears to have proceeded upon the ground that the managing member having the control of the family property in his own hands could not proceed by suit and process to enforce his individual claim against the property.

We see nothing in these decisions that materially conflicts with (and some of them support) the opinion we have above expressed, and *Sir Thomas Strange*, in the first volume of his work of authority, at p. 202, expressly says, "That in favour of a *bonâ fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due out of the share of him with whom he had dealt, and for this purpose a Court would be warranted in enforcing a partition." What the purchaser or execution creditor of the co-parcener is entitled to is the share to which, if a partition took place, the coparcener himself would be individually entitled, the amount of such share of course depending upon the state of the family. In this case there appeared to be two brothers and a stepmother, and the share of each brother is a moiety. There is no evidence of Ayyasvami having sons. If he had, they would no doubt be entitled to shares in their father's moiety, and so the property available for the plaintiff would, to the extent of their shares, be reduced, and except in this way, the existence of sons would not, we think, affect the plaintiff's right.

Section VII.

As to the Right to Demand Partition among Co-Heirs.

This excludes those who are not co-heirs—Who are entitled to maintenance only—Wife cannot claim in her own right—Where there are male issue neither can a daughter—One member may divide—Or all—And afterwards re-unite—Partition of father's property may take place during the life of the mother—Of mother's property during life of husband—In Bengal—In every province except Bengal—Where there are several widows with sons—Patni Bhaga—Putra Bhaga—Effects of the two modes of division—Amongst Soodras—Stepmothers and grandmothers—Widow of husband separated from co-heirs—Daughter—Where brothers and sisters of same tribe—Division presumed to be general—Whether an only son entitled to demand partition from his uncles—Nephews entitled as far as the fourth in descent—The son of one of four whole brothers, though his father insane, entitled to one-fifth of property acquired by joint funds—Absentees entitled as far as seventh in descent—But those at home as far as fourth in descent—Minor—Period of

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absence—What constitutes a foreign country—After-born sons—Pregnant widow of a co-heir—Grandsons are entitled to their father's share, per stirpes—*Not to equality individually with uncles and cousins—Land goes to the son born by the wife of equal class—Illegitimate sons do not inherit even moveable wealth—But are entitled to maintenance—Son of a man by a woman of a higher class by Soodra—Renunciation of share.*

We have still to consider—

1. As to the right to demand partition. 2. The property to be divided. 3. How division takes place. 4. Evidence.—To resume our inquiries as to partition among co-heirs, and,

1. As to right to demand partition.—The right to demand a partition exists only in those who are considered as heirs. This, of course, excludes those who have only a right to maintenance, and, consequently, the female members of the joint family who have certainly an interest in the property, but only to the extent of their maintenance. *Sir Thomas Strange* says, that the interest which a wife has in partition by, or in the life of the husband is merely incidental, vol. i. p. 188.

Wife cannot claim in her own right where there are sons—neither can a daughter.—The wife cannot claim it in her own right, *Apastamba*, 3 *Dig.* 27, 422, 427; 1 *Stra. H. L.* 189. A daughter takes nothing as of right during her father's lifetime, 1 *H. L.* 190, 203. She is equally barred from calling for it after his death, see *post*, p. 389. Where there are male issue, therefore, the widow or widows are entitled to maintenance only, for they cannot present the funeral cake, *Devala*, 3 *Dig.* 10; 1 *Stra. H. L.* 203.

One member may divide.—Partition may take place with reference to one or more members of the family, leaving the rest still undivided, 1 *Stra. H. L.* 204, or all may join in it and afterwards may become re-united. See Re-union, *ante*, p. 385, 328.

During life of the mother.—It has been thought by some that it could not take place during the mother's life in consequence of a forced construction having been placed on the precept of *Menu*, ch. ix. § 104, "After the death of the father and mother the brothers may divide the paternal and maternal estate." But it is manifest that *Menu* in this passage was treating of two classes of property, one of the father, and the other of the mother, and with that terseness of expression which is peculiar to almost all ancient writers in most languages, he united the two branches of his subject in one sentence, so that what he really meant to express was, that after the death of the father the brothers may divide the paternal estate, and that after the death of the mother they may divide the maternal estate, and accordingly the author of the *Smriti Chandrika* has explained the meaning to be that the death of the one and of the other has reference distributively to their several property, so that there may be a division of the father's

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property during the mother's life, and *vice versâ*, there being no reason to await the demise of both in order to divide what has belonged to either, neither having ownership in the other's property where there are children, 1 *Stra. H. L.* 204; inasmuch, then, as the wife has no ownership in the property of the husband during his lifetime, nor the husband in that of his wife during her lifetime, on the death of either, without children, the survivor may succeed by virtue of inheritance.

IN BENGAL.—In Bengal the lawfulness of division during the mother's life is denied, *Jim. Vahana*, ch. iii. s. i. § 13; 3 *Dig.* 78. But this opinion is construed by his commentator, *Srikrishna*, as importing that the partition is valid, but not morally right; and by *Ragh. Dayatatva*, that if it be made, a share is ordained for the mother; and by *Kasirama* on *Dayatatva*, that it is not laudable, not that it is null, 1 *Stra. H. L.* 204.

IN EVERY PROVINCE EXCEPT BENGAL.—And *Mr Colebrooke*, after a careful examination of every material passage applicable to the point, was of opinion, that a division during the mother's life was allowable throughout every province, with the exception of Bengal, 1 *Stra. H. L.* 204.

Sir W. H. Macn. P. H. L. 50, says, Partition may be made also while the mother survives. This rule, though at variance with the doctrine of *Jim. Vahana*, has nevertheless been maintained by more modern authorities, and is universally observed in practice, 3 *Dig.* 78.

According to the *Jim. Vahana*, *Raghunandana*, *Srikrishna*, and other Bengal authorities, when partition is made by a father, a share equal to that of a son must be given to the childless wife, not to her who has male issue. But the doctrine laid down by *Harinatha* is, that if the father reserve two or more shares, no share need be assigned to the wives, because their maintenance may be supplied out of the portion reserved. The *Vivadarnavasetu* holds that the wife is entitled to an equal share where the father gives equal shares to his son, but that where he gives unequal shares and reserves a larger one for himself, he is bound to allot to each of his wives from the property reserved to himself as much as may amount to the average share of a son, *Misra, Daya Krama Sangraha*, ch. vi. § 27; 1 *Macn. P. H. L.* 48.

The doctrine laid down by *Jagannatha* is, that if the wife have received from any quarter wealth which would ultimately have devolved on her husband, such wealth should be included in the calculation of her allotment. But if she received the wealth from her own father or other relative, or from the maternal uncle or other collateral kinsman of her husband, it should not be included, her husband not having any interest therein, 1 *Macn. P. H. L.* 48.

The law of Benares, Mithila, and elsewhere differs from the Bengal school on this subject, and is not in itself uniform or consistent. *Vignyneswara* ordains, "When the father by his own choice

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makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband or father-in-law, must be made participants of shares equal to those of sons." But if separate property had been given, the same authority subsequently directs the allotment of half a share, "or if any had been given, let him assign the half," *ib.* 48.

According to *Madhavacharya*, if the father by his own free will, make his sons equal participants, he ought to make his wives, to whom no separate property has been given, partakers of a share equal to that of a son; but if such property has been presented to her, then a moiety should be given. *Kamalakara*, the author of the *Vividatandava*, declares generally, that whether the father be living or dead, his wives are respectively entitled to a son's portion. But *Sulapani*, in the *Dipakalika*, maintains, that if the father makes an equal partition among his sons by his own choice, he must give equal shares to such of his wives only as have no male issue; and *Helayudha* lays it down, that wives who have no issue male are here intended, *ib.*

Misra ordains, "That when he reserves a greater part of his fortune, and gives some trifle to his sons, or takes a double share for himself, the husband must give so much wealth to his wives out of his own share alone. Accordingly, the separate delivery of shares to wives is only ordained when he makes an equal partition," *Daya Krama Sangraha*, ch. vi. § 27. *Macn. P. H. L.* 49, sums up the argument thus: "In case of an equal partition made by a father among his sons, his wives who are destitute of male issue take equal portions; where he reserves a large portion for himself, his wives are not entitled to any specific share, but must be maintained by him; and where unequal shares are given to sons, the average of the shares of the sons should be taken for the purpose of ascertaining the allotments of the wives. The same rules apply also to paternal grandmothers, in case of partition of the ancestral property," *ib.* 49.

WHERE THERE ARE SEVERAL WIDOWS WITH SONS.—There are two modes of division adopted where there are several widows with sons, varying in number by each, some more, some less, called *Patni Bhaga*, or division by wives, or *Putra Bhaga*, or division by sons. If the number of sons by each wife be equal, the allotment may be to the mothers, according to the former mode of division, leaving it to them to subdivide among the sons. This appears very fair. But the principle upon which this mode is adopted being that the division to the wives must always be an equal one, (*Coleb.*, 2 *Stra. H. L.* 352.) where the number of sons by each varies, its effect is very different. Thus, if one wife has one son, another three, and a third six, and each wife takes a third of the property, it is clear that the share of the sons will be very different in each case. So unnatural a mode of division is allowed only among Soodras, and even among them, only where there is a custom for it, and

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which must be strictly proved, 1 *Stra. H. L.* 205 ; *Sumrun Singh* v. *Khedun Singh*, *Beng. R.* 1814, p. 443. *Mr Ellis* says, "I know not that any authority admits *Patni Bhaga* to be the true rule. It is only allowed by some, and entirely rejected by others."

Effects of the two modes of division.—The division by *Putra Bhaga* must always be unequal with respect to the children of each *venter;* for if there be two wives, and one son by either first or second of the two, he takes half the estate, and if there be a dozen by the other, they take no more among them. In the present case, dividing by *Putra Bhaga* the three sons would take each one-third of the estate, and the mother and sisters would be jointly provided for. If by *Patni Bhaga*, the son of the first marriage takes one-half, and provides for his own mother only, those of the second take one-half also, and provide jointly for their mother and sisters. If the order had happened to be reversed, and the single son been of the second marriage, he, though the younger brother of the four, would still have got half of the whole estate. These are the effects of the two modes of division which I have taken this opportunity of explaining—an explanation which, I think, clearly shows that no judge should allow of the division of *Patni Bhaga* if he can avoid it, 2 *Stra. H. L.* 352. *Mr Ellis*, in another case, says, In many parts of the southern countries the custom of dividing the property in equal shares to the *venter*, and afterwards equally between the sons of the several *venters*, is so strongly established that it must be allowed to supersede the general law, 2 *Stra. H. L.* 357.

Amongst Soodras.—Where a Soodra died leaving two wives, one with an only son, an infant, and the other with two sons. Held, that the guardian of the infant might refer the question, whether the deceased's estate should be divided according to *Patni Bhaga* or *Putra Bhaga*. *Temmakal* v. *Subbammal*, 2 *Mad. H. C. R.* 47. It was decided in another case that among Hindoos in the Madras Presidency, the division must be by sons, and not by wives. *Ex relatione, Mr Justice Strange.*

Stepmothers and grandmothers.—*Vyasa* declares [the right] to share even of a stepmother and paternal grandmother. "Even childless wives of the father are declared equal sharers, and so are all the paternal grandmothers or wives of the paternal grandfather, they are declared equal to mothers." From this word *all* the step-grandmothers also are to be included, *Mayukha*, ch. iv. s. iv. § 19 ; *Vishnu*, 18, 34, 35 ; *Jim. Vahana*, ch. iii. s. ii. 32.

Widow of husband separated from his co-heirs.—From the texts of *Yagnavalchya*, *Menu*, *Narada*, *Katyayana*, and others, cited in the *Mitacshara*, *Viramitrodaya*, *Vyavaharamadhava*, *Vyavahara*, *Mayukha*, and other authorities, it would appear that if the four individuals being descended from the same grandfather have not been separated from each other, the widow (respondent) of one of them is only entitled to her food, raiment, and a house for her residence. But if her husband have been separated from his

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co-parceners, then she is entitled to inherit his property, 2 *Macn. Prins. H. L.* 169.

But the allotment of shares to the wife does not imply separation, the conjugal intercourse remaining after partition among sons, *Apastamba*, 3 *Dig.* 27, 426, 427 ; 1 *Stra. H. L.* 189. Her share, when assigned to her, is more in the nature of alimony than *stridhana*, or *the peculiar property of a woman*, and is resumable by her husband if necessary, *ib.*

DAUGHTER.—Daughters can neither claim nor share division. Unmarried daughters take nothing during their father's life, *Mitac.* ch. i. s. vii. § 14 ; *Narada*, 3 *Dig.* 48, 52. The law gives nothing to a married daughter where male issue is left, 2 *Stra. H. L.* 311, *C.*

WHERE BROTHERS AND SISTERS ARE OF THE SAME TRIBE.—On division among brethren to the unmarried daughters, such portions are allotted as may suffice for the due celebrations of their nuptials, 2 *Stra. H. L.* 289 ; *Macn. P. H. L.* 50. This portion has been fixed at the fourth of the share of a brother, *i.e.*, if there be one son and one daughter, the whole paternal estate should be made into two parts, and one of these two parts made into four, the daughter takes one of these fourths ; so, if there be two sons and one daughter, the estate should be made into three parts, and one of these three made into four, the daughter takes one of these ; so, if there be one son and two daughters, the estate is divided into three parts, and two of these parts made into four, the daughters each take one of these fourths, *Mitac.* ch. i. s. vii, § 7. *Macn .P. H. L.* 51, It must be similarly understood in any case of an equal or unequal number of brothers and sisters. Where brothers and sisters are of different tribes, see *Mitacshara*, ch. i. s. vii. § 8. And *Macn. ib.* p. 54, adds, But according to the best authorities, these proportions are not universally assignable, for which the estate is either too small to admit of this being given without inconvenience, or too large to render the gift of such portion unnecessary to the due celebration of the nuptials; the sisters are entitled to so much only as may suffice to defray the expenses of the marriage ceremony. This provision for the sisters is not an absolute right, although it is a charge upon the inheritance. It is intended more to uphold the general respectability of the family, *Macn. Cons. H. L.* 103 ; *Sir W. H. Macn. P. H. L.* 51. See *ante.*

DIVISION PRESUMED TO BE GENERAL.—In any case of division *all the members* are *primâ facie* presumed to have divided the whole property, and any one who denies having got any share will have to give very strong evidence of the partial division, either in respect of shares or amount, with reference to any particular portion of the property. See *Dec.* 118 of 1859 ; 1 *Sel. Dec.* p. 52 ; *Dec.* 87 of 1861.

WHETHER AN ONLY SON IS ENTITLED TO DEMAND PARTITION FROM HIS UNCLES.—*Menu.* ch. ix. § 104, says, "Brothers being assembled,

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shall divide the inheritance." This text has been used for the purpose of showing partition cannot take place at the instance of a single co-heir; but *Jimuta Vahana* says that partition takes place by the will of any one, [of the co-heirs,] ch. iii. s. i. § 16.

A member of an undivided family died, leaving three brothers undivided, and a son of eight years of age under charge of one of his uncles. The son on coming of age called upon his guardian uncle to account for his father's share of the property, which the uncle refused to do, alleging that the nephew was only entitled to share in common with his uncles and cousins. *Mr Colebrooke* held, that the right of the nephew to receive his father's share from his uncle is explicitly declared in a passage of *Katyayana*, (cited 3 *Dig.* p. 7, text lxxix,) and the power of any one of the co-heirs to exact partition of the joint property may be gathered from the *Mitac*, and is distinctly affirmed by *Jim. Vahana*, ch. iii. s. i. § 16, *supra.*

Nephews whose fathers are dead are entitled as far as the fourth in descent to participate equally with the brethren, and these take *per stirpes*, *Macn. Prins. H. L.* 50.

THE SON OF ONE OF FIVE (WHOLE) BROTHERS, THOUGH HIS FATHER WAS *insane*, IS ENTITLED ON PARTITION TO ONE-FIFTH OF PROPERTY ACQUIRED BY JOINT FUNDS.—It appeared that the estate was jointly purchased by the four defendants and the plaintiff's father, who were whole brothers, and living jointly; but that at the time of the purchase the father was insane, and the plaintiff a minor, who had since attained his majority. If one of the five brothers was mad, and all of them were undivided, and the four purchased the estate with the joint funds of all five, although the deed of sale be drawn out in the name of the four sane brothers, still if the plaintiff be free from similar defect of madness, he is entitled on partition to one-fifth of the property; but if the property were purchased without aid of the joint funds, he has no right to share, *Vivadaratnacara, Vivadachintamani, Mitacshara*, &c., 2 *Macn. Prins. H. L.* 165. On the death of a father or *other owner of property*, neither an impotent man, nor a person afflicted with elephantiasis, nor a madman, nor an idiot, nor one born blind, nor one degraded for sin, nor the issue of a degraded man, nor a hypocrite or impostor, shall take any share of his heritage. For such men, except those degraded, let food and clothes be provided, and let the sons of such as have sons take the shares of their parents, if themselves have no similar disability. *Devala* cited in the *Vivadaratnacara*, "On partition of co-heirs, all the wealth left by their father, or by his father, and what they themselves have acquired by their joint efforts, shall be divided among them." *Katyayana*, "What they themselves have acquired, excepting that for which there is a cause of severalty. The term self-acquired here means acquired with the use of the father's funds, *Vivadachintamani;* 1 *Macn. P. H. L.* 165.

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ABSENTEES ENTITLED TO SHARE AS FAR AS THE SEVENTH IN DESCENT.—Where consent cannot be obtained in consequence of some of the members of the family residing in a foreign district, or province, or collectorate, the partition may, nevertheless, proceed, the law requiring the preservation of his share until his return, as far as the seventh in descent, *Vrihaspati*, 3 *Dig.* 84, 440; *Jim. Vahana*, ch. viii. § 1–4; 1 *Stra. H. L.* 188; 2 *ib.* 327; *Stra. Man. H. L.* § 233. But query, how far the statute of Limitations would prevent this rule from applying?

BUT THOSE AT HOME AS FAR AS FOURTH.—But descendants only as far as the fourth degree of one who had remained all along in this country are entitled to share his wealth; for it has been formerly declared that the fifth in descent and the rest confer no benefits on the deceased owner since they are not competent to present funeral oblations to him at solemn obsequies, *Daya Krama Sangraha*, ch. viii. § 11. His right is therefore barred after the fourth in descent. See 2 *Stra. H. L.* 327, 395; *Devala*, 3 *Dig.* 10; *Vrihaspati*, *ib.* 440.

MINOR.—It may be enforced on behalf of minors. See Minority.

PERIOD OF ABSENCE.—The period allowed in such cases varies according to the age of the party at the time of his leaving home for a foreign country. *Sir Thomas Strange* says, vol. i. p. 188, The period is generally twenty years, although, in one place, it is said that the law presumes him dead after twelve years, if no tidings have been heard of him, and requires his son to perform obsequies for him, 1 *Dig.* 266–269, 278; 1 *Stra. H. L.* 168, *ante*, p. 75.

WHAT CONSTITUTES A FOREIGN COUNTRY.—Difference of language, intervention of a mountain, or great river, and distance, where intelligence is not received within ten nights, have been held to be essential in the consideration of what constitutes a foreign country. But probably none of those circumstances would, in the present day, be much relied on; the departure from one province, or district, or collectorate, for another, affording a surer criterion. Thus where a Caranese went to reside in Telingana, or a Tamulian in Benares, or a Bengalee in Bombay.

AFTER-BORN SONS—PREGNANT WIDOW OF A CO-HEIR.—Should any of the widows of the co-heirs happen to be pregnant at the time of their death, or be supposed to be so, the partition should be postponed, or a share set aside to abide the contingency of her having an after-born son. On failure of that contingency, such share falls in, and becomes distributable in like manner as the other property, subject to the maintenance of the widow. But should the event happen without anticipation, then the share of such son, not having been reserved, must be allotted by contribution among the parceners who have divided, 1 *Stra. H. L.* 207; *ante*, p. 347.

On division being made after the death of a brother, who may have demised without male issue, a share must be taken out of the divided shares for his posthumous son, should his widow

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bear one to him, *Stra. M. H. L.* § 265; *Mitac.* ch. i. s. vi. § 11.

Grandsons claiming by representation are only entitled to their father's share, the aggregate sons of each being entitled *per stirpem*, and not to an equality individually with their uncles and cousins. Although grandsons have a right in the grandfather's estate equally with the sons, still the distribution of the grandfather's property must be adjusted through their fathers, and not with reference to themselves. The meaning is, if unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another three, and another four, the two receive a single share in right of their father; the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So, if some of the sons be living, and some have died, leaving male issue; the same method should be observed; the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively, *Mitac.* ch. i. s. v. § 2; *Yajnavalchya,* 2, 121; *Katyayana,* 2; 3 *Dig.* 7, 62.

Land goes to the son borne by the wife of equal class alone.—Land obtained by acceptance of donation must not be given to the sons of a Kshetriya, or other wife of inferior tribe; even though his father give it him, the son of a Brahmini may resume it when his father is dead, *Vrihaspati; Mitac.* 292, ch. i. s. viii. § 8; *Jim. Vahana,* 147, ch. ix. § 19; *Devala,* 3 *Dig.* 136; *Mayukha,* ch. iv. s. iv. § 28. The son begotten on a Soodra woman by any man of a twice-born class is not entitled to a share of land, but one begotten on her being of equal class, shall take all the property, [whether land or chattels;] thus is the law settled, *Mitac. ib.* § 9; *Jim. Vahana,* ch. ix. § 22; *Mayukha,* ch. iv. s. iv. § 28.

Of land acquired by purchase, and the other modes also; yet he does obtain a share of the [moveable] wealth, *Mayukha,* ch. iv. s. iv. § 28.

The right to a share may be renounced.—The same rule holds on a partition amongst co-heirs, as between father and son; where one does not want a share he may waive his right by acceptance of a trifle, which shall ever after operate as an estoppel in respect of his claim, *Menu,* ch. ix. § 107; *ante,* p. 374; 1 *Stra. H. L.* 195, 207. But he cannot renounce his share, unless he is able to maintain himself, *Mitac.* ch. i. s. ii. § 11, 12.

Yajnavalchya treats of a case "where a man wishes to give up his right to participate in a share. The separation of one who is able to support himself, and is not desirous of participation may be completed by giving him some trifle." According to the *Mitacshara,* it means, that "anything whatever may be given for the sake of preventing the desire being entertained by his sons of receiving a share of the heritage," *Mayukha,* ch. iv. s. iv. § 16; *Menu,* ch. xi.

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§ 207; *Mitac.* ch. i. s. ii. § 11, 12; *Yajnavalchya*, 2, 117; 3 *Dig.* 65, 68; 1 *Stra. H. L.* 195, 207.

SECTION VIII.

UPON WHAT PROPERTY PARTITION ATTACHES.

Upon what property partition attaches, ancestral and self-acquired—Distinction between with reference to partition—Father has no discretion as to former, whilst latter depends on his own will—This rule does not prevail amongst co-heirs—What property incapable of division—Jaghire—When acquired at the expense of the patrimony—Though science should have been the means of acquisition—The acquirer takes a double share—In Bengal, an acquirer using joint property has two shares—In Benares—A polliyam—Enam villages—A shrotriyam—A corrody—Pagodas—Lands endowed for religious purposes—Women are not partible—Clothes, vehicles, ornaments, &c., &c.—Where one member has more jewels than another—Books, tools, &c.—Regalities and zemindaries—Land granted to maintain rank, &c.—Nuptial gifts—Annuity—Conocopoly—Kurnam—Self-acquisitions—The acquisitions of a man made by his own means alone are not divisible amongst his brothers—Half brother—Acquisitions by one of four brothers with the aid of his father's funds and labour will, on partition, be made into ten shares—Five go to the father, two to the acquirer, and one to each of the brothers—If acquired without any aid, into two parts, the father taking one, and the acquirer one, the brothers having no right to any share—Acquisitions made by a man jointly with his brother's four sons, with joint funds, will be divided into two portions, of which one will be taken by the acquirer, and the other be shared by the four sons of the brother—Younger brother joined with elder in management of self-acquired property—Where the expenditure is incidental to the acquisition, and has not been made for the express purpose of gain, the expenditure does not give the gain a partible character—Divisibility of gains of science—In respect of what acquisitions the rule applies—Gains by science—Gifts of a friend—Nuptial gifts—Gifts must be made to the donee—Exception to rule that acquisitions without the use of the common stock, or by joint exertion, are not divisible—Property recovered—Recoverer entitled to a fourth—Rule applies to land—Gains by valour acquirer takes superior share—Special property—Water in wells and tanks—Couches, eating and drinking vessels—Cow paths—Ways—Books—Alienation may be affected for the support of the family—Not otherwise—Managing co-heir has power to bind co-heirs for a debt contracted for the concern.

Upon what property partition attaches.—We have already seen that there are two descriptions of property which are the subjects of partition, the one ancestral, the other self-acquired. Upon partition in the lifetime of the father, there is a difference with reference to the distribution of these two classes of property, the father having no discretion with regard to the former, while with regard to the latter the distribution to some degree depends upon his will and discretion, *ante*, pp. 347, 351, 369, 373. This distinction, however, does not prevail among co-heirs, whose right attaches on both kinds, and who are entitled to an equal division of everything, unless, indeed, things used for religious purposes, which remain in common, 1 *Stra. H. L.* 208.

What property is incapable of division.—There are certain species of property which form an exception to the general rule of Hindoo law—viz., that property held in association is divisible amongst the co-heirs. These cases are governed more by usage than general law, and will depend upon the terms of the grant.

Jaghire.—The owner of an extensive jaghire died, leaving two sons, the elder of whom succeeded to it, the younger accepting some villages as his portion. The jaghire was in possession by descent of the great-grandson (by adoption) of the owner, and the great-grandson by the younger branch now set up a claim to a share of it, and upon a question submitted to the pundit as to the claimant's right, he answered, As to the divisibility of a jaghire, it is stated in ancient books, that the crown was entailed upon the eldest son, the rest provided with means for their livelihood, being left to conquer for themselves new countries, ... therefore a kingdom is not divisible, 2 *Dig.* 122. Mr Ellis remarks upon this case, that this is a very good opinion, ... a jaghire is a fief (it may be hereditary or not) held under such conditions, and for the performance of such services as the grantor pleases to prescribe. The jagirdar possesses no powers except such as are necessary for the collection of the revenues in the country assigned to him, or such as may be specially conferred by the terms of his grant. Such tenure, therefore, can bear no resemblance to what the law calls *Rajiyam*, the enjoyment of sovereign power, paramount or subordinate. The latter cannot be divided, for division would destroy it, and it is a maxim that nothing shall be divided which would be destroyed by the Act. But the effects and private estate of a sovereign prince may and ought to be divided like the property of others amongst his children, 2 *Stra. H. L.* 328. *Mr Thackaray* says, The succession of zemindaries has never been regulated by the common Hindoo law of inheritance, but by the usage of the country or the pleasure of government. Had they been divisible, we should not have found so many of ancient date still existing as we do, 2 *Stra. H. L.* 330; *Beemlah Dibeh* v. *Goculneth*, *Beng. R. ante*, 1805, p. 32; *Koonwur Bodh Singh* v. *Sconath Singh*, *ib.* 1813, p. 415; *Ramgunga Deo* v. *Doorgamunee Jobrai*, *Beng. R.*

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1809; *Uerjun Manie Thakoor* v. *Ramgunga Deo, ib.* 469, 1814; 1 *Stra. H. L.* 198.

Mr Thackaray is not accurate in arguing that the succession of ancient zemindaries depends on the pleasure of government. It depends more on the custom of the family.

A JAGHIRE OR OTHER GRANT ACQUIRED AT THE EXPENSE OF THE PATRIMONY DOES NOT BELONG EXCLUSIVELY TO THE ACQUIRER.—One of three whole brothers, living jointly in possession of their paternal estate, acquired a jaghire or pension in land, and obtained a few villages as a grant from his father-in-law. If the jaghire had been gained at the expense of the patrimony, it must be divided among all the brothers; but if it has been acquired solely by the labour of one brother, without the aid of the paternal estate, in this case it will not be shared by all the brothers, as it becomes the exclusive property of him who acquired it. So the villages may have been acquired by the father-in-law with his own money, and given by him to his daughter's husband, and in this case they cannot be shared by all the brothers. As *Menu* says, "What a brother has acquired by his labour, without using the patrimony, he need not give up, without his assent, for it is gained by his own exertion," 2 *Macn. Prins. H. L.* 166.

THOUGH SCIENCE SHOULD HAVE BEEN THE MEANS OF ACQUISITION.—The estate will be acquired at the expense of the patrimony, if it was obtained out of something taken from the patrimonial estate, or if the acquirer, having been supported at the expense of the ancestral property, had studied science, by means of which he held a situation, and obtained a jaghire; for, according to Hindoo law, any property acquired by an unseparated brother by means of science, which science he was enabled to obtain by assistance from his father's funds, will be participated by his brothers, 2 *Macn. Prins. H. L.* 167.

THE ACQUIRER TAKES A DOUBLE SHARE.—Whether the jaghire be acquired by the direct use of the patrimony, or through science gained by its means, the acquirer is entitled to two shares, and the other brothers to a single share each. He among them who has made an acquisition may take a double portion of it, *Vrihaspati, Aghoree Shewchurnram* v. *Aghoree Kurtaram,* 2 *Macn. Prins. H. L.* 167.

BENGAL.—According to the Bengal law, an acquirer using joint stock has two shares, but the Benares school propounds an exception to this maxim, and they support an equal division in cases of addition to, or improvement of the original property, without any separate acquisition. The *Mitacshara* says, "Among unseparated brethren, if the common stock be improved, or augmented by any one of them, through agriculture, commerce, or similar means, an equal distribution nevertheless takes place, and a double share is not allotted to the acquirer, 2 *Macn. Prins. H. L.* 167, n.

A POLLIYAM is explained in *Wilson's Glossary* to be a tract of

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country subject to a petty chieftain. In speaking of *polliyars* he describes them as having been originally petty chieftains, occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount state, but seldom paying either, and more or less independent, but as having at present, since the subjugation of the country by the East India Co., subsided into peaceable landholders. A *polliyam* is in the nature of a raj.* It may belong to an undivided family, but it is not the subject of partition. It can be held by only one member of the family at a time, who is styled a *polliyar*, the other members of the family being entitled to a maintenance or allowance out of the estate, *Naragunty Lutchmee Davamah* v. *Vangama Naidoo*, 9 *Moore's In. Ap.* 66; see 1 *Stra. H. L.* 198, 199, 208, 286; *Stra. Man. H. L.* § 47; 2 *Dig.* 532, 533, citing *Narada.*

It is somewhat similar in its nature to a Gwatwal tenure, which was upheld by the judicial committee of the Privy Council in *Rajah Selamund Singh Bahadoor* v. *Bengal Government*, 6 *Moore's In. Ap.* 101.

The succession to the paragunty *polliyar* in Madras being ancestral estate, held to vest in the nearest undivided male cousin of the *polliyar* last seised, who died without issue male in preference to the widow.

The following question was propounded by the Court to the pundits of the Sudr Adawlut. This *polliyam*, the ancestral property of a family said to be undivided, has descended to an adopted son, K., and on his death, without male issue, is taken possession of by his widow, L. The *polliyam* is now claimed by H. and J., the cousins of I., the adoptive father of K., as their inheritance. Is such claim valid, or is L., the widow of the adopted son K., who died without male issue, entitled to succeed to the *polliyam?* The pundits answered as follows:—The Hindoo law books, *Vignyaneswara*, &c., declare that all the members of an undivided family have a joint right in their ancestral property, although only one of them, being capable, continues in possession thereof. I., who had no issue, was not justified in adopting K., a stranger, as a son, to the exclusion of his undivided cousins H. and. J; but as he adopted him he, K., became a member of the said undivided family; and the said H. and J. being his undivided cousins, still retain their joint right to the ancestral family property. It is only when a family is divided that a widow succeeds to the estate of her husband, who died leaving no son; but when the family is undivided the right of succession is not in the widow, but in the undivided cousins. This being the rule of the Hindoo law, H. and J., the undivided cousins of I. and K., are alone

* A *polliyam* is in the nature of a zemindary, the succession to which is regulated by the deed of permanent settlement, which recognises the order of inheritance according to law and custom. It is only when the custom of the family has been proved to exist limiting the succession in a particular manner, or when an estate is proved to have been an ancient zemindary that it descends contrary to the ordinary rules of Hindoo law, 3 *Morley Dig.*, pp. 187, 189, Inheritance by Custom.

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entitled to inherit the ancestral *polliyam* referred to in the question. L., the widow of K., has no right to succeed to it.

The pundits consulted by the Court said the Judicial Committee in delivering judgment, as to the rule of Hindoo law, on the assumption that the plaintiffs had established their allegations by evidence, were of opinion that they were entitled to succeed. This view was adopted by the Court below, and no objection to the decision upon this point has been urged at our bar, *ib.*

ENAM VILLAGES.—Enam villages, granted by the government to the grantee and his heirs male, for services rendered to the state, are governed by the principles of Hindoo law, respecting the partition of the father's estate among his heirs. There is nothing peculiar in the case, the division is according to Hindoo law,* *Bodhrao Hunamont* v. *Nursing Rao*, 6 *Moore's In. Ap.* 426. Enam grants are not by the Hindoo law in force in the Southern Mahratta country, distinguishable from other ancestral real estate, and are divisible among the heirs of the grantee, *ib.*

A SHROTRIYAM.—Originally, a shrotriyam was an assignment to a shrotriya or Brahmin well read in the *Vedas*, 2 *Dig.* 290,† it is conferred by government, in consideration of the individual merits of the grantee. The succession to the property would be regulated either by law, or by the terms of the grant. Supposing the grant to be exclusive, it would not be partible among collaterals, *Purtaub Bahaudur Sing* v. *Telukdhasse Sing*, *Beng. R.* 1805, p. 101. And consequently, upon the death of the shrotriyumdar, leaving sons, it would descend (not to the eldest merely, but) to all the sons in common; the uncles would not share in the inheritance, 1 *Stra. H. L.* 210. In one case, the grantee being dead, leaving sons and daughters, a dispute arose between the eldest son and the uncles, as to whom it belonged, whether to the lineal representatives of the deceased exclusively, or to them only in common with their uncles. The pundit replied to this point, The first and the other sons are to enjoy the property in question equally, defraying out of what they have, the necessary expenses of the family, and getting the daughters married. Property acquired by the deceased and his brothers, through their joint industry, or the use of their patrimony, which was in common, the latter are interested in together with the sons of the deceased. For his separate acquisitions vest exclusively in his descendants. In remarks upon this case, *Mr Colebrooke* refers to *Mitacshara*, ch. i. s. iv. § 10, 31, where a reference is made to the text of *Menu*, " What a brother has acquired by his labour, without using the patrimony, he need not give up to his co-heirs."

Mr Ellis says, a *shrotriyam* granted for public services is an honourable reward to the individual, and an inducement to others to act as he has done. But the honour and inducement are both

* Of course the grant may regulate the descent.

† Cruti, (κλυτός,) in contradistinction to *Smriti* law, note by *Stokes*, *Sundaramurti Mudali* v. *Vallinayakki Ammal*, 1 *M. H. C. R.* 465.

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lost, by its becoming the same as ancestral property, and being subject to endless division. Of divisible property the daughters would be entitled to a share on division taking place before their marriage, but it does not appear that they can demand a division. *Mr Thackaray* says, The brother of the deceased shrotriyumdar can have no claim upon any grounds. It was not ancestral property, but given by the government as a reward for services to the individual. The government never would have granted it if they had thought an idle brother could have claimed a share.

And *Mr Sutherland* says, I am inclined to concur in the general accuracy of the pundit's opinion, nor can I find anything inconsistent with the grant, that the estate should be enjoyed by the heirs of the grantee according to their legal interests. Any practical inconvenience which, in the course of time, might be experienced would be ascribed not to tha law, but to the want of explicitness in the grant. In the present case the estate having been acquired by the exclusive exertions of the grantee, his brothers have clearly no right to participate in it, 2 *Stra. H. L.* 365.

As to the interest of the unmarried daughters doubt certainly presents itself. I cannot but regard as more correct, more consistent with the genius of the Hindoo law, the opinions of those writers who admit the right of unmarried daughters to receive from their deceased father's estate, merely what may be sufficient to provide for their marriage. Texts, however, of *Menu* and *Yajnavalchya* are adduced which mention the fourth part of a brother's share as the unmarried sister's allotment; and *Vignyaneswara* in the *Mitacshara* denies that the mention of a quarter of a share can be construed as used indefinitely, and as merely intending that a sufficiency to provide for the daughter's marriage should be given. This author accordingly contends, that after the decease of the father, the unmarried daughter participates in the inheritance, receiving one-fourth of what would be her share were she male, *ib.* The doubt thrown out by *Mr Ellis* above, viz., "that the honour and inducement by its becoming the same as ancestral property, and being subject to endless division," is not very satisfactorily met by the remark of *Mr Sutherland*, viz., that "any practical inconvenience which in the course of time might be experienced would be ascribed not to the law, but to the want of explicitness in the grant." *Sir Thomas Strange*, 1 *H. L.* 210, adopts the opinion of *Mr Sutherland*, 2 *ib.* 367, "as to this leading to endless divisibility, the objection being inherent cannot be helped, unless obviated by the terms of the grant importing a particular limitation, since otherwise the law must prevail."

There is no doubt that ordinarily self-acquired property goes to the sons as co-heirs of the acquirer, but the distinction has not been drawn between such property which follows the ordinary course of descent and that which is granted as an honourable reward to an individual, and as an inducement to others to act as he

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has done; and although it may be argued with some show of reason that "heirs" in Hindoo law does not refer to an only son alone, but includes all the sons as co-heirs, and that therefore a shrotriyam descends to all the heirs in co-parcenery, and is divisible, yet the intention of the government in making this particular description of grant must have been that it should operate as an exception to the rule, and should go to the eldest son, see *Regulation* iv. of 1831, *Mad.* The consideration for the grant, and the objects of the grant, are purely exceptional. There must be some reason for limiting the grant to the grantee and his heirs. There is no such limitation with reference to any other self-acquired property. In a note to 2 *Stra. H. L.* 366, it is said, "It would seem from this (the observation of *Mr Ellis* above quoted, *ante*, p. 397) to have been *Mr Ellis's* opinion that the grant, on the death of the grantee, should enure not to his heirs generally, but to a select one, according to the notion expressed by him in the following remarks in 2 *Stra. H. L.* 363," speaking of the conocopily of a village, "I doubt whether the maravurtanah, &c., perquisites of office granted for the performance of specific duties can be 'accounted the same as household property.' On the contrary, it appears to me that they cannot so be accounted. For what is the real nature of them? Are they not given for the subsistence of the office, enabling him to apply his whole time and attention to the accounts of the village, and would not the division of them among a number for whose maintenance they cannot adequately provide destroy their object? Again, does not the law that regards the grant of *a corrody* apply to these and similar perquisites? and has not the grantor, or he who pays, a right to see that they are appropriated according to the original intention under which they were granted? I have no doubt but it applies, and that similar official perquisites, though certainly heritable, are not divisible, nor ought they to descend by primogeniture. The most capable of the direct, or in their default, of the collateral descendants of the first grantee, should be selected for the performance of the duties of the office, who should enjoy the whole perquisites." See *Reg.* xxix. of 1802; vi. of 1831, *Mad.*

A SHROTRIYAM IS INALIENABLE.—A *shrotriyam* has been held to be inalienable, except for the holder's life interest, *Sundaramurti Mudali* v. *Vallinayakki Ammal*, 1 *Mad. H. L.* 465, *ante*, p. 132.

A CORRODY.—A *corrody* seems to be an incorporeal hereditant, 1 *Stra. H. L.* 16. It is the grant of an annuity assigned upon some particular fund, 2 *Dig.* 163; 1 *Stra. H. L.* 209. It signifies what is fixed by a promise in this form, "I will give that in every month of Kartiki," *Jim. Vahana*, ch. ii. § 13. Deliverable annually, monthly, or at any other fixed periods, *ib.* note by *Srikrishna.* Where one of an undivided family, being the conocopily of a village, received the *Mara Vurtanah*, *Bazar Vurtanah*, and other dues, a question was submitted to a pundit as to whether he was ac-

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countable for them to his co-parceners, notwithstanding he alone discharges the whole duty? His reply was, that brothers undivided must, without reservation, equally share all the cattle and household goods left by their father, and the Mara Vurtanah being considered the same as household property, it follows that the perquisites in question are divisible.

Upon this *Mr Colebrooke* remarks, "If the office be hereditary in the family, the dues or profits appertaining to it must be subject to be shared. But in such case it classes with immoveables; and corrodies and the dues belonging to it, cannot be reckoned household property," 2 *Stra. H. L.* 363.

Sir Thomas Strange, 1 *H. L.* 209, says, But a corrody being the grant of an annuity assigned upon some particular fund, if made to one of an undivided family and his heirs, with nothing in it to control the operation of the law, would, upon the death of the grantee leaving sons, descend in common, and be divisible among them on partition, *Katyayana*, 3 *Dig.* 375; *Mayukha*, ch. iv. s. vii. § 23.

Offices attached to pagodas.—So with regard to the various offices attached to pagodas and other religious houses of the natives; *teertam* or holy water, either of some sacred spring or a mixture of liquids in which the sacred images have been washed; and *prasadum* or holy food, prepared in the pagoda for the consumption of holy men, and the rights of Brahmins attendant upon funerals and the like, which, however, some of them may be disposable by regulating the periods of their enjoyment, as they are in general hereditary, so are they common and divisible, 3 *Dig.* 375. *Mr Colebrooke* says, The hereditary privileges of the family, with the income arising from them, are divisible among heirs, like other patrimony under the general rules of inheritance. At most of the religious establishments of the Hindoos, and at their great temples, the various offices attached to them are considered as hereditary, together with the perquisites belonging to them, 2 *Stra. H. L.* 369.

Lands endowed for religious purposes.—Lands endowed and set apart for religious purposes are not inheritable, and therefore not divisible, though the management of them may be so, *Elder Widow of Rajah Chutter Sein* v. *Younger Widow of Rajah Chutter Sein, Beng. R.* 1807, p. 103; 1 *Stra. H. L.* 208, 210; *Stra. Man. H. L.* § 27.

Women.—Women are not partible, *Jim. Vahana*, ch. vi. s. ii. § 23; *Mayukha*, ch. iv. s. vii. § 19; *Mitac.* ch. i. s. iv. § 16; this term is supposed to apply to the wives of co-heirs, 1 *Stra. H. L.* 211.

Clothes, vehicles, ornaments, prepared food, water, women, and furniture, for repose or for meals, are declared not liable to partition, *Jim. Vahana*, ch. vi. s. ii. § 23, 24; *Mitac.* ch. i. s. iv. § 16. Clothes which have been ordinarily worn must not be divided, *Mitac.* ch. i. s. iv. § 15; *Daya Krama Sangraha*, ch. iv. s. ii. § 13.

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On the principle of appropriation things become impartible, what is used by each person belongs exclusively to him, *Mitac.* ch. i. s. iv. § 17, 18, 19; 1 *Stra. H. L.* 210. But clothes of value, as court dresses and the like, worn only on particular occasions in which all are interested, remain for common use, and are not liable to partition. But if they are sold the proceeds are, 3 *Dig.* 376, 381; 1 *Stra. H. L.* 211.

WHERE ONE MEMBER HAS MORE JEWELS, ETC., THAN ANOTHER.—It appears that if one member of the family have more jewels, or apparel than another, the excess should be divided, *Mitac.* ch. i. s. iv. § 19; 1 *Stra. H. L.* 211; 2 *ib.* 370; 3 *Dig.* 373. What clothes had been usually worn by the father must be given after his death at partition to the person who partakes of food at his obsequies. "The clothes and ornaments, the bed and similar furniture, appertaining to the father as well as his vehicle and the like, should be given after perfuming them with sacred drugs and wreaths of flowers to the person who partakes of the funeral repast, *Vrihaspati, Mitac.* ch. i. s. iv. § 17–19.

BOOKS, TOOLS, &C.—*Sir Thomas Strange* says, Books, tools, and implements of art belong generally to those who can best employ them, the rest taking to other parts of the property, unless where the whole consists of nothing else, in which case there must be a general distribution, or a sale, and equal division of the proceeds, 1 *H. L.* 213, *post*, p. 412.

REGALITIES AND ZEMINDARIES.—Regalities and ancient zemindaries which have vested in the eldest son are impartible, on the principle that royalty is indivisible, 1 *Stra. H. L.* 198, 208. But the personal property of the king or zemindar are an exception to the rule, and are partible, 2 *Stra. H. L.* 329, 330; *Ellis; Stra. M. H. L.* § 280, ii. iv. *Judgment of Sadr Court in R. A.* 11 of 1816 and 64 of 1848; *Dec.* 12 of 1850; 1 *S. D.* p. 141, Lands purchased with the profits of these regalities, &c., are partible property. But though the former are not partible, the younger sons are entitled to a maintenance, which ought to be apportioned with reference to the dignity of the family and the extent of the possessions of the reigning son; and it would seem that they are also entitled to a residence either in the family mansion, or elsewhere.

LANDS GRANTED TO MAINTAIN RANK, ETC.—Land specially granted to maintain the rank and dignity of a family, *Judgment of Sadr Court in R. A. 5 of* 1850; *Sadr Dec.* 94 *of* 1851, *and* 74 *of* 1858; *Stra. M. H. L.* § 280, iii., or settled by government on the eldest son. But land purchased with the surplus profit of these estates ranks as personal property, and may be divided. But this will, of course, depend upon the terms of the grant.

NUPTIAL GIFTS.—Nuptial gifts received by a man with his wife are exclusively his, even although the joint property bears the expenses of the marriage; as the expenditure is incidental only it does not render them partible. So what is received at a marriage

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in the form termed Assoora, at which presents are made by the bridegroom to the father or kinsman of the bride, 1 *Stra. H. L.* 215, 216.

ANNUITY.—An annuity descending to the sons of an annuitant is divisible, 1 *Stra. H. L.* 209; *Stra. M. H. L.* § 283.

DUES ATTACHED TO THE OFFICE OF KURNAM.—Dues attached to the office of kurnam are, in an associated family, in practice brought into the common stock, but after separation, inasmuch as the dues are inseparable from the office, they belong exclusively to the person performing the duties. The kurnam and conocopoly, in the sense *Sir Thomas Strange*, vol. i. p. 210, uses the latter term, perform the same duties.

SELF-ACQUISITIONS.—This is the subject with reference to which questions upon the divisibility of property most frequently arise. We have more than once remarked that property amongst Hindoos is either ancestral or self-acquired, or it may be both. The subject of ancestral property has been already fully discussed, and that of self-acquired property partially, the more complete elucidation of which now becomes necessary.

The common stock of an undivided family may be augmented, and improved during their joint occupation by the different members of the family, and the question whether these accretions are the sole property of him through whose instrumentality they accrued, or whether they become the joint property of the common family, and therefore liable to division as ancestral property, (partaking of the nature of both,) depends in a great measure upon whether they arose from the employment of the common stock, or by the sole original and independent exertions of the individual; and if the former, the benefit arising from such augmentation or improvement accrues to all alike, without regard to the degree in which each contributed to its augmentation. And such accretion may be said to be of the nature of ancestral property; at all events, it follows the law of that class of property as to the incident of divisibility. If, on the other hand, its acquisition is not attributable to the use of the joint stock, but is solely due to the original and independent exertions of the individual acquirer, then, upon partition, his co-heirs will have no right to a share, although during its accretion he continued undivided from them, and he enjoyed in common with them all the advantages of union, *Mayukha*, ch. iv. s. iv. § 5; *Jim. Vahana*, ch. vi. s. i. § 30–38; *Mitacshara*, ch. i. s. iv. § 1–6, 10, 29; *Daya Krama Sangraha*, ch. iv. s. ii. § 1, *et seq.*; 1 *Stra. H. L.* 213, 214; 2 *ib.* 372.

THE ACQUISITION OF A MAN MADE BY HIS OWN MEANS ALONE IS NOT DIVISIBLE AMONGST HIS BROTHERS.—Whenever property, moveable or immoveable, may have been gained by a co-parcener without detriment to the paternal estate, such acquisition becomes his sole property, and his brothers have no claim to it. Should there have been joint labour or funds used, the acquisition must be

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equally divided among the brothers, as declared by *Menu* and *Yajnavalchya*, 2 *Macn. Prins. H. L.* 161.

HALF BROTHER.—A brother, whether of the half or whole blood, cannot share the acquisitions exclusively made by his brother without the use of the patrimony; but if it were made with the use of the joint funds, according to the law as current in Bengal, the acquirer should have twice as much as the rest of the co-parceners, but to any augmentation in the nature of an increment this rule does not apply, and all the brethren share equally. "Among unseparated brethren, if the common stock be improved or augmented by any one of them through agriculture, commerce, or similar means, an equal distribution nevertheless takes place, and a double share is not allotted to the acquirer," *Mitac.* ch. i. s. iv. § 31.

Whether the joint stock contributed to the acquisition is sometimes a nice question; and *Mr Ellis*, (2 *Stra. H. L.* 373,) says, "The judge must determine, on an equitable consideration of the circumstances of the case, whether the acquisitions of any of the individual parceners have been made without such use of the family property as in law would render them divisible."

Where brothers are living in union, the law will imply that acquisitions are made by the use of the family property. But when the contrary is shown, they are not divisible. Mr *Ellis* was of opinion, in one case where the defendant acquired learning without the aid of the family property, that if he had been educated by his father the case would have been different, for it must have been at the expense of the family had it been so, and in that case *the acquisition would by consequence have been family property*. *Sir Thomas Strange* adds a *quære* as to the position in italics, 2 *H. L.* 376; and if *Mr Ellis* be correct, there is scarcely any self-acquisition that would not in one sense have been obtained through the instrumentality of the family property; for a man's education is always conducive more or less to the acquisition of wealth. Probably what *Mr Ellis* meant to say was, that after the death of the father, if the common stock is employed in educating any of the coheirs, and he, by means of that education accumulates wealth, the ancestral property has sustained detriment by the expenditure on the education, there being no moral or legal obligation on the coparceners to apply the common fund for any such object. His observation must be read with reference to the facts of the case upon which he writes, and there the defendant educated himself, and it was sought to show that the common stock was used for that purpose; at all events, it would be a strange doctrine, in the absence of more direct authority on the subject, to hold that because a parent, in the exercise of, at most, a moral obligation, disburses some of the ancestral property in educating his son, that all the acquisitions of that son arising primarily or secondarily from

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such education were derived from the employment of the common stock, and therefore divisible. It must, however, be admitted that *Mr Ellis's* remarks are specially directed to a case where the son was educated by the father. Such an expenditure seems more properly to come within the category of an incidental one.

JOINT FUNDS—ACQUISITIONS BY ONE OF FOUR BROTHERS WITH THE AID OF HIS FATHER'S FUNDS AND LABOUR, WILL, ON PARTITION, BE MADE INTO TEN PARTS, OF WHICH FIVE WILL GO TO THE FATHER, TWO TO THE ACQUIRER, AND ONE TO EACH OF HIS BROTHERS; IF ACQUIRED WITHOUT ANY AID INTO TWO PARTS, THE FATHER TAKING ONE, AND THE ACQUIRER ONE, THE BROTHERS HAVING NO RIGHT TO ANY SHARE.—In both cases, the acquirer's sons are entitled to the portion to which their father was entitled, *Daya Bhaga, Daya Tatwa,* and other authorities. The text of *Katyayana* cited in the above authorities, "A father takes either a double share or a moiety of his son's acquisitions of wealth." Here the father has a moiety of the goods acquired by his son at the charge of his estate; the son who made the acquisition has two shares, and the rest take one apiece. But if the father's estate had not been used, he has two shares—the acquirer as many, and the rest are excluded from participation, *Daya Bhaga;* 2 *Macn. Prins. H. L.* 164.

ACQUISITIONS MADE BY A MAN JOINTLY WITH HIS BROTHER'S FOUR SONS, BY MEANS OF JOINT FUNDS, WILL BE DIVIDED INTO TWO PORTIONS, OF WHICH ONE WILL BE TAKEN BY THE ACQUIRER, AND THE OTHER BE SHARED EQUALLY BY THE FOUR SONS OF HIS BROTHER.—Supposing one of the two undivided brothers to have died, leaving four sons, his brother, and a son, him surviving, and the family to have subsequently separated in respect of food only; and after the elder brother's death, their property being undivided, and lands having been acquired by means of their joint funds and labour in the name of the surviving brother's son, and that son to have managed the estate; in this case the property will be made into two shares, of which one will go to the four sons of the deceased brother, in right of their father, and the remaining one to the surviving brother. The portion which will go to the four sons of the deceased brother will be equally shared by them, *Daya Bhaga, Daya Tatwa,* and other authorities, 2 *Macn. Prins. H. L.* 163. But it must be understood in this case, that the sons of the deceased brother did not individually contribute anything to the acquisition. The right they derived was from their father and in virtue of his contribution, 2 *Macn. P H. L.* 163 n.

YOUNGER BROTHER JOINED WITH ELDER IN MANAGEMENT OF SELF-ACQUIRED PROPERTY.—If a younger brother is associated with an elder in the management of property acquired solely by the latter, he is entitled to his share, *Abraham* v. *Abraham,* 9 *Moore's In. Ap.* 195.

INCIDENTAL EXPENDITURE.—Where the expenditure is incidenta to the acquisition, and has not been made for the express purpose of

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gain, the expenditure does not give the gain a partible character. Thus the expenditure of wealth for nourishment, maintenance, or otherwise, must necessarily be made by a person remaining at home, and though it contribute to the end, yet, as it was not designed for the acquisition of wealth, it cannot be considered as the cause of the acquisition, since that is similar to the sucking of the mother's milk, *Visvarupa, Jim. Vahana*, ch. vi. s. i. § 47, 48. Hence, [because its being actually intended for that purpose, is a requisite to its being the cause of the acquisition, *Mahesvare,*] though much wealth belonging to the father have been expended in festivity at the son's initiation, or at his wedding, what is obtained by him in alms during his austerities as a student, or received on account of his marriage is not common, for that expenditure of wealth was not made with a view to gain, *ib.* § 49. So that, to give the acquisitions a joint character, there must have been a joint labour, or the common fund must have directly contributed to the gains, *Jim. Vahana*, ch. vi. s. i. § 48–51.

Divisibility of gains of science.—The ordinary gains of science are divisible when such science has been imparted at the family expense, and acquired, while receiving family maintenance; otherwise, where the science has been imparted at the expense of persons not members of the learner's family, *Chalakonda Alasani* v. *Chalakonda Ratnachalam*, 2 *Mad. H. C. R.* 56.

Mr Justice Holloway, in delivering judgment in this case, said, We are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science, which have been taught at the expense of the family funds, are not impartible. To render them so, the science or learning must have been imparted by persons not members of the learner's family; and the learned judge adds, that although, in deference to the elaborate judgment of the Civil Court, we have entered upon this discussion, it is in our opinion doubtful whether, upon the facts of this case, the question arises.

All the authorities in support of this rule of Hindoo law, which is most difficult to apply in practice, were, in this case, cited both by the civil judge, (who held an opinion adverse to that just expressed by *Mr Justice Holloway,*) and by *Mr Sloan*, who argued the case for the appellant with great ability. Yet it can hardly be regarded as an authority which decides this intricate and difficult question of Hindoo law, for the judgment of the appellate Court did not proceed upon that ground, but turned on a very different point—viz., the gains of prostitution. The question of the divisibility of the gains of science and learning acquired by one of its members amongst an undivided Hindoo family has therefore yet to be decided, and the better opinion seems to be, that when it does come before the Courts for judicial decision it will be held that the opinions of old text writers and commentators will have to give way like other equally complicated and

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embarrassing rules of the same law; such, for instance as the rule which makes vice an impediment to inheritance before the enlightenment of sounder reason and the requirements of modern society. It will be found that the impossibility of applying the rule with any regard to the principles of law or equity will induce the Courts to hold, that it is a relic of a past and barbarous age, which cannot be acted upon in consequence of its impracticable nature, arising from the difficulty of drawing the line as to what is, or is not, imparted at the family expense. Its impracticability lies at the very foundation of the rule, for what source of gain is there that is not traceable, if not attributable, to expenditure of family funds? What science or learning, which has been acquired by the members of a family is there that is not primarily, or remotely attributed to the expenditure of ancestral property? A member of a Hindoo family can acquire no gains without the preliminary expense of maintenance. Does maintenance, then, cause the gains of learning or science to be divided amongst the fraternity? No man can acquire science without the rudiments of education, upon which family property has been expended. Does that cause his self-acquired property to be brought into hotchpot and divided amongst his brethren? A father wishes his son to become a member of a learned profession, or to be trained to commercial pursuits. The ancestral property has been spent in preparing him for the position for which he is ultimately destined. He still remains undivided, and has accumulated wealth. Are his acquisitions to be applied to the enrichment of his brothers, simply because he has been taught a profession, or a trade, or has accepted maintenance from the ancestral funds? It is impossible for any man to gain wealth without the ancestral property having in some manner contributed directly or indirectly to its acquisition. Does that give his brothers an interest in his self-acquired property, and a right to share in the distribution of the family property on its partition? Can it confer upon the family a right to participate in his acquisitions, when he is availing himself of nothing more than the law gives him, without exacting anything from him in return?

In respect of what acquisitions the rule applies.—Wealth acquired by learning,* anything given by a friend, received at or on account of marriage, or presented as a mark of respect to a guest, gains by science, or by valour, or wealth received from affectionate kindred belongs to him who acquired it. Hereditary property which had been taken away but recovered, acquisitions by labour, as agriculture, service, merchandise, what a man gains by his own ability without relying on the patrimony, the wealth of a wife, *Mayukha*, ch. iv. s. vii. § 1, *et seq.; Jim. Vahana*, ch. vi. s. i. § 1, *et seq.; Mitacshara*, ch. i. s. iv. § 1, *et seq.; Daya Krama Sangraha*, ch. iv. s. ii. § 1, *et seq.;* 3 *Dig.* 338. Each of these

* See the enumeration of acquisitions by learning, *Mayukha*, ch. iv. s. vii. § 5.

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have received extended significations. Acquisition by learning is explained to be wealth gained through science, which was acquired from a stranger, while receiving a foreign maintenance, *Katyayana.*

The Sanscrit word for science (*vidya*) is derived from the word *vid*, to know, signifies any knowledge or skill, *Jim. Vahana*, ch. vi. s. ii. § 17. In fact, in all cases whatsoever, wherein superior skill is required, the wealth gained is technically denominated the acquisition of science, *Jagannatha*, 3 *Dig.* 340.

It includes what was gained by solution [of a difficulty] after a prize has been offered, what is obtained from a pupil, or by officiating as a priest, or for answering a question, or for determining a doubtful point, or through display of knowledge, or by success in disputation, or for superior skill in reading. It extends to the arts; what is won from another as a stake at play, or a fee for a correct opinion between two litigants on a point of law, so in a contest between two persons respecting their knowledge of sacred ordinances, or in any other contest respecting their attainments; what is won by beating another at play; what is gained by painters, goldsmiths, and other artists. Having taken gold or the like belonging to the joint stock, and having made bracelets or similar things, the value which is thus superadded by the skill of the artist to the price of the gold, &c., is an acquisition made through science, *Srikrishna; Jim. Vahana*, ch. vi. s. ii. § 1–13, and note, § 1; *Mayukha*, ch. iv. s. vii. § 5; *Katyayana*, 3 *Dig.* 333; *Daya Krama Sangraha*, ch. iv. s. i. § 13.

GIFT BY A FRIEND.—The importance of gifts or presents from a friend is enhanced, "since it is in such modes that acquisitions are usually made without expenditure," particularly among Brahmins, *Jim. Vahana*, ch. vi. s. i. § 8; 1 *Stra. H. L.* 216; *Menu*, ch. x. § 115, ch. xi. § 24, 42, 70, 254. *Sir Thos. Strange* says, vol. i. p. 215, With regard to a gift, in order to its vesting separately, it must have been pure in its motive and personal in its object, for, if it were in return for something previously given, it would be liable to be considered as common property, common property having been used in obtaining it. Not that wherever there have been mutual gifts, the gifts to the co-parcener are necessarily partible. It depends upon whether the one have been in consideration of the other; a present made with a view to a return. A gift under such circumstances loses the nature of one, *do ut des*, it is too like a contract, the result of which is common.

NUPTIAL GIFTS.—*Menu*, ch. ix. § 206, says, Anything received on account of marriage is not partible. *Katyayana* says, What is received by a damsel equal in class at the time of accepting her [in marriage,] let a man consider as wealth received with the maiden, it is deemed pure, and promotes increase [of prosperity.] But let him know that to be received on account of marriage, which is accepted by him with his bride, *Mayukha*, ch. iv. s. vii.

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§ 13,* and is not partible. What is received at a marriage concluded in the form termed *assoora*, or the like. For at such a marriage wealth is received from the bridegroom by the father or kinsman of the bride, *Mitac.* ch. i. s. iv. § 6, and note; 1 *Stra. H. L.* 216. See *Menu*, ch. iii. § 31.

GIFTS MUST BE MADE TO THE DONEE.—The gift must be made to the donee, for if anything be given to one expressly in consideration of his being the son of a person named, all the sons of that person are entitled to partake on the ground of common relationship, *Srikrishna* and *Achyuta; Jim. Vahana*, ch. vi. s. i. § 51, note, 1 *Stra. H. L.* 216.†

EXCEPTION TO RULE.—An exception in a case or two may be made to the precept that acquisitions without the use of the common stock, or by joint exertion, are not divisible. Thus treasure found by an unseparated brother is one instance, and the receipt of anything given by a stranger through commiseration is another. These, although not obtained by means of the joint fund, nevertheless, are divisible, *Jim. Vahana*, ch. vi. s. i. § 37, note, *Srikrishna*, 1 *Stra. H. L.* 216.

A practice, however, prevails amongst virtuous people of dividing wealth gained by receipt of presents without expenditure of joint property, either from a feeling of mutual affection, or manly sentiment, or upon the erroneous notion of *Srikara* and others, that property acquired before separation is impartible, and they have done it voluntarily. But this is not founded on uniform practice, *Jim. Vahana*, ch. vi. s. i. § 53; *ib.* s. ii. § 13, note, *Srikrishna.*

PROPERTY RECOVERED.—Even property inherited from the paternal grandfather which has been long lost, and is not recovered by the rest through inability or through aversion from the efforts requisite for its recovery, belongs exclusively to the father, if recovered by him at his own expense, and by his own labour, and is not common property, *Jim Vahana*, ch. vi. s. ii. § 31, 32, 34; *ib.* ch. vi. s. i. § 33, 40; *Mitac.* ch. i. s. iv. § 1; *Mayukha*, ch. iv. s. vii. § 3; 3 *Dig.* 365, requires the acquiescence of the other sons; and *Sir Thomas Strange*, 1 *H. L.* 217, adds, Unless there appear to be an abandonment of them, by which silent neglect on their part may be evidence, the onus of proof of acquiescence should be upon the party claiming. C. and B., represented respectively by the appellant and respondent, were descended from R., who in his lifetime was proprietor of two of the villages in dispute. About the time of his death, one V., having joined the French during an engagement, took possession of these two villages. C. and B. thus lost their patrimony, and they separated, and from that time until the

* In the 3d *Dig.* 363, this text is attributed to *Menu*, but it is not found there.

† This rule has been supported in a case in the Madras High Court, but believed not to be reported.

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death of B., a period of eighty years, the intercourse between their respective descendants ceased. After C.'s death and separation, B. procured assistance from the E. I. Company, subdued V., and recovered possession of the two villages which had been formerly taken from the family. A share in them is now claimed by the descendants of C., and the question was, Whether the villages were the particular acquirement of B., or were included in the patrimony?

The pundit replied, If during the time that C. and B. were in possession of their patrimonial estate it was seized by their enemy V., and subsequently recovered by B., without aid from the patrimony, he and C. having antecedently separated, the general conclusion would be that it is B.'s as his particular acquirement. But to be certain, it is necessary to know whether their separation took place with the intervention of relations and witnesses with deeds of division; and further, whether the recovery subsequently by B. was with the privity and acquiescence of the sons and grandsons of C. The acquiescence alluded to, means a writing purporting, "You will subdue back our patrimonial property which was seized and possessed by a stranger and enjoy it yourself, I shall expect no part of it." It is further necessary to know with reference to a passage of *Vyasa, Jim. Vahana*, ch. vi. s. i. § 14, whether in the reconquest of the property in question, money, carriages, arms, or other things belonging to the patrimony were used, and in what, if any, degree, or whether the recovery were made exclusively of it. If upon examination it appears that B. acted on the occasion without the warrant, or cession from the original co-parceners or their representatives, notwithstanding his merit and continued enjoyment for a length of time, the property is still liable to division, more especially if obtained by means common to him and them, one-fourth being previously deducted as his remuneration for the recovery. With respect to the village obtained during the collectorate of *Mr Place*, the right to it whether it is to be considered as sole or joint, depends upon its having been acquired, or not, by the employment of the patrimonial property.

And *Mr Colebrooke* remarks upon this case, The acquiescence spoken of by the pundit is required by the restriction stated in the *Mitacshara*, commenting on a passage of *Yajnavalchya*. See *Mitac.* ch. i. s. iv. § 2. When no division has taken place, *i.e.*, if the brethren were not separated in their interests and concerns, the patrimony which is recovered, is recovered to the use of all the heirs, allowing however one-fourth as remuneration to him who recovered it. See *Sancha*, cited *Mitac.* ch. i. s. iv. § 3.

And *Mr Ellis* says, This is an excellent and very correct opinion of the pundit; but it may be convenient to explain the general law upon which it turns. If at the time an estate is divided, any part of the assets belonging to it, in whatever shape they may exist, be not forthcoming so as to enable an actual division of them to be

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made, either the parceners must come to some mutual agreement regarding them prospectively to the recovery, or the right to such property will continue to rest in them jointly, their heirs and representatives, in the same manner as if no division had ever taken place. Hence the pundit properly says, "It is necessary to know whether the separation took place with the intervention of relations," &c. It is necessary to know in fact the exact terms and agreements under which C. and B. separated, for in this case it is not sufficient to prove the mere fact of separation, it must be seen whether any specification were made at the time respecting the villages removed by the act of V. from the possibility of actual division. If it were said at the time, "Whoever recovers the family property let him keep it," the question is at rest. If it was not so said, then B. must have been taken to have been acting for the joint interest in the recovery he effected; the property so recovered, notwithstanding the division, remained joint property, being a portion of the assets that was never divided. In this view he cannot be allowed to appropriate it to his own use, the villages retain their original character of joint family property, and are divisible among the surviving representatives of R., the common ancestor. As to the right of the representatives of C., to cede their claim to B. if they chose to do so, and to that of B. (by the same rule that applies to the actual acquirer of property) to an addition to his shares under certain circumstances with his sole right to the third village obtained after separation from his brother;—these require but one remark, it is, That if it can be shown that he recovered the family property first, and used it to acquire the third village, this also becomes divisible, reserving to B. his claim to a superior share, 2 *Stra. H. L.* 379.

WHERE LANDED PROPERTY LOST TO THE FAMILY, MAY BE RECOVERED BY A CO-HEIR WITHOUT AID FROM THE FAMILY RESOURCES, HE IS ENTITLED TO A FOURTH.—The recoverer is entitled to a fourth only, instead of a double share. *Sankha* says, "Land inherited in regular succession, which had been formerly lost, and which a single (heir) shall recover solely by his own labour, the rest may divide according to their due allotments, having first given him a fourth part," *Jim. Vahana*, ch. vi. s. ii. § 38. The acquirer has a fourth part in addition to his own regular share, *ib.* § 39, the meaning of the text is, "Having given a fourth part of the land in addition to the person who recovered it, all the co-heirs, together with him, shall take equal shares." It is not understood from the term "the rest," that a fourth part only shall be given to him, for it would be an unequal rule, since the person recovering the land would receive less than his co-heir, if there be one or two sharers unconcerned in the recovery, *Srikrishna, ib.*, note to § 39; *Mitac.* ch. i. s. iv. § 3; *Daya Krama Sangraha*, ch. iv. s. ii. § 8; see 2 *Stra. H. L.* 379. This like augmentation or improvement might have been treated as self-acquired property.

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Sir Thomas Strange, 1 *H. L.* 220, says, The claim is to a fourth only instead of a double share; the merit of recovering what has only been withheld not being considered equal to that of making a new acquisition. But whether by this is to be understood a fourth of the whole property recovered, or only a fourth of an equal share added to a share, seems uncertain, *Jim Vahana*, ch. vi. s. ii. § 38; *Mitac.* ch. i. s. iv. § 3; 3 *Dig.* 366; *Bengal R.*, *ante*, 1805, p. 36. Where the co-heirs consent, of course, a more unequal distribution may take place, 1 *Stra. H. L.* 220; 2 *Stra. H. L.* 382.

Sir Thomas Strange, *supra*, adds, The effect of the use of the joint stock in rendering separate acquisitions, in general common, is attended sometimes with injustice, where in cases of small patrimony large fortunes are made by the unaided exertions of enterprising parceners, of which the benefit may eventually be shared by drones, who have in no degree conduced to their accumulation. Nor to obviate this is there any resource where timely separation has been omitted; a right to the benefit of each other's labours being incident, where co-partnership has continued, and the joint property been instrumental. But where the latter has not been the case, the claim to participate fails, though made by an unseparated member, *Soobuns Lal* v. *Hurbuns Lal*, *Beng. R.* 1805, p. 7. This rule also holds in Madras.

Gains by valour.—*Vyasa* says, "Wealth gained by science, earned by valour, or received from affectionate kindred, belongs at the time of partition to him who acquired it, *Jim. Vahana*, ch. vi. s. i. § 10. So *Narada* excepts from division what is gained by valour, the wealth of a wife, and what is acquired by science, *ib.* 12. These sources of wealth are joint, if attended with a sufficient cause of joint right, *ib.* § 51, note. *Srikrishna*, *Mayukha*, ch. iv. s. vii. *Katyayana* explains gains by valour to be, When a soldier performs a gallant action, despising danger, and favour is shown him by his lord, pleased with that action; whatever property is then received by him shall be considered as gained by valour. That, and what is taken under a standard, are declared not to be subject to distribution; what is seized by a soldier in war, after risking his life for his lord, and routing the forces of the enemy, is named spoil taken under a standard, *Jim. Vahana*, ch. vi. s. ii. § 20; *Daya Krama Sangraha*, ch. iv. s. i. § 3. But if the family estate were instrumental in its gain, it would be partible, *Mayukha*, ch. iv. s. vii. § 7.

Wherever there has been employment of the joint, or common funds, or the joint exertion of the co-heirs in the acquisition of wealth, it is partible, but the acquirer takes a superior share, 1 *Stra. H. L.* 219. In all other instances, that of property recovered excepted, a share extra the number that is to divide is given to the special acquirer, beyond his equal share; and if more than one have been concerned with him, they participate in the excess, *Vasishtha*, 17, 42. "He among them who has made an acquisition may take a

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double portion of it," *Jim. Vahana*, ch. vi. s. i. § 28 ; *Mitac.* ch. i. s. iv. § 29 ; 3 *Dig.* 356, 405.

SPECIAL PROPERTY.—There is another class of property which partakes of a kind of middle nature, not being absolutely divisible, because of its incapability to be cut up into sectional parts, yet in which the co-heirs have nevertheless a certain interest. A direct partition in such instances being inconvenient, a virtual one takes place. Such are water in wells and tanks, which must be taken by each according to his exigency, couches adapted to the use of each, and eating and drinking vessels used by each, the path for cows, the carriage road, clothes, and anything worn on the body, books which must go to the learned, the taker giving to the unlearned an equivalent, so whatever is adapted to the exercise of the arts the artist takes, so of a dwelling-house and other property of a like nature, pasture land for cattle, *Daya Krama Sangraha*, ch. iv. s. ii. § 13, *et seq.; Mayukha*, ch. iv. s. vii. § 15–22.

These are all more or less modified by local custom, or by usage, applicable to the particular class or community ; and *Sir Thomas Strange*, 1 *H. L.* 221, says, Equality, subject to convenience, being the object, the means of attaining it, appear to be left very much to the suggestions of reason and good sense, having regard to the circumstances of the families, and the nature of the property to be divided.

ALIENATION MAY BE EFFECTED FOR THE SUPPORT OF THE FAMILY, NOT OTHERWISE.—The rule being that the family property or patrimony is not to be arbitrarily aliened, *ante*, p. 107, a loan, gift, even for a good (as a religious) purpose, sale, or hypothecation. If made by a parcener on his sole account, does not bind the family property unless effected for the support, or interest, or spiritual benefit of the whole. His own share, however, would be bound, *ante*, pp. 82, 107.

The plaintiff stated that the defendant gave him a bond in the name of his elder brother for a sum due on account of clothes purchased, to which the defendant alleges in answer, that as he did so by direction of his brother, who is living, the latter should have been made the defendant. To which the plaintiff replied, that they are an undivided family, and that the elder brother, not being on the spot, and the defendant having given the bond, though in the name of the elder brother who received the goods, the action is properly brought. The question was, Is it under these circumstances maintainable against the defendant ? To which the pundit replied, that the elder brother being alive, though absent, the younger is not liable. Upon which *Mr Colebrooke* remarks, This opinion appears to proceed on the ground of the elder brother being sole manager, and alone personally responsible for debts contracted on the common account. This, however, would not exempt the joint stock and youngest

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brother's share of it from being answerable for the debt. The absence of the elder, independently of the debt having been contracted by the younger brother in the name of the elder, rendered the younger in this case even personally amenable; see 1 *Dig.* text, clxxx. and following gloss. It would be otherwise if the debt be taken to be contracted on the separate account of the elder brother, in which the younger would not be answerable in consequence of the absence of the elder until the lapse of twenty years, *ib.* clxxv. While *Mr Ellis* says, with respect to the answer of the pundit, Here the letter of the general law is applied without discrimination, to a particular case. Where was the estate? Did it remain in the management of the younger brother? Whoever is in the management of the joint estate is answerable for all claims upon it, be he elder, or younger, 2 *Stra.* 334, 335.

It will be observed that *Mr Colebrooke* assumes more than the question warranted. *Mr Ellis's* remarks are more strictly according to the law. It must, however, be observed that the act of the younger brother would not bind the family property unless it were intended for the benefit of the family.

MANAGING CO-HEIR HAS POWER TO BIND PARCENERS FOR A DEBT CONTRACTED FOR THE CONCERN.—Being the managing member of a family partnership, the elder brother has a power to bind his partners for a debt contracted for the concern, and his brothers will be bound by his act unless they can show that the debt, though purporting otherwise, was contracted for his separate interest, and that the lender was apprised that it was so, *Colebrooke.* *Mr Ellis,* says, Whoever has the management, elder or younger, binds by his acts the other parceners, 2 *Stra. H. L.* 335.

The defendant executed a bond to the plaintiff's father for a debt due to him by the father of the defendant. At the time of executing it he, (the defendant,) his younger uncle, C. R., and his elder uncle's son, T. R., were living together undivided. Three years afterwards they divided their property and lived separately, and the question was, Whether the defendant was liable to pay the whole amount of the bond or his proportion only? To which it was replied that, It appearing that the bond was given by the defendant for a debt due from his father to the father of the plaintiff was for so much borrowed for the common benefit while living in copartnership, the amount of the debt should be paid in the proportions in which the several parties divided the estate, and consequently the defendant is answerable for his proportion only, *Vignyaneswara.* Upon which *Mr Colebrooke* remarks, The action is properly brought against the defendant; and the plaintiff should have had judgment against him, leaving him to recover from his uncle and cousin their rateable proportions, the debt having been originally contracted for the common concern, and the payment of it, not otherwise provided for on the partition. But if the son had not entered into a new obligation the opinion

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delivered in this case would be correct, as in such circumstances the son is answerable only for his father's share of the debt contracted by him when acting for his co-heirs. See 1 *Dig.* text clxxxii. *Venkatakistnyengar* v. *Narayen*, 2 *Stra. H. L.* 336; *Kistniengar* v. *Sreenyvassyengar*; *ib.* 338.

Under the principles of Hindoo law a contract entered into by one parcener authorised to bind his co-parceners is virtually a joint obligation binding on the joint family, and therefore the suit appears to have been improperly instituted, as all the surviving co-parceners were not proceeded against.

The defendant and the husband of the plaintiff were undivided brothers. Their mother died. The defendant, in the absence of his brother, made a gift of land on her death, the defendant being at the time in possession of the family property. The question raised was, Was the gift good as against the absent brother, unauthorised by him? The answer was, Where one brother has the consent of the others for a present, a sale, or a mortgage, all will be bound by it. In the present case the gift in question is as against the absent brother, the same as if it had not been made, notwithstanding the doctrine that a mother is to her son as a divinity; the effect of which is, that a gift of a man out of his own share, with a view to her salvation on occasion of a sacrifice offered to her, will be a gift on good consideration. But the defendant was incapable of making such an one out of lands, the property of both, without joint concurrence. This seems to be a very good opinion, upon which *Mr Colebrooke* remarks, see *Mitac.* ch. i. s. i. § 28, 29, The gift being made for the spiritual benefit of the mother's shade, and as far as appears being not excessive for that purpose, according to the religious notions of the parties, seems to come under the description of indispensable duty, for which one brother is competent to make a valid gift without consent of the other; it could not therefore be recalled. The action, however, does not appear to have been brought for this purpose, the donee being no party to the suit, but for that of charging the whole gift against the donor's share of property, in which view also the maxim cited from the *Mitacshara* is averse to the plaintiff's claim, which goes to disallow this disposal of property as for the common concern. And *Mr Ellis* observed, If the husband of the plaintiff had during his lifetime sued the defendant, he might have recovered, as the bringing of the action would have implied that the alienation was made without his consent. Or if the plaintiff had proved not merely that his consent was not given, but that he refused it at the time of the alienation, or disapproved the act as soon as he was informed it had taken place, then she would have been entitled to recover. But the Hindoo law will infer* that all charitable acts performed by one parcener, especially one so sacred as that which operates towards

* It is doubtful how far the presumption referred to holds good. *Mr Ellis* cites no authority to show the existence of such presumption.

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the "salvation" of the common mother, are performed on account of, and with the consent of the rest, the contrary not being shown; and, in the present case, the contrary is not shown; as it does not appear that the then living parcener objected to the gift being by his brother, or that he disapproved of it at any subsequent period; had the alienation been made for any common purpose, not charitable, the inference of the law would have been directly the reverse of what I have stated; it would have been that the absent parcener did not consent, unless the contrary were shown; in this case it is that, unless the contrary were shown, he did consent. The Pundit has not sufficiently considered these legal distinctions.

Sir Thos. Strange adds, It may be remarked, in addition to the above observations, that had the plaintiff's husband been a minor at the time of the grant in question, it would have been clearly good without his consent, which he would not during minority have been competent to give, *Mitac.* ch. i. s. i. § 28, 29. It does not appear that he was a minor; but it is stated that he was absent at the time, which would be equally material, as connected with the occasion of the grant, being the death of the mother, whose ceremonies could not conveniently wait.* Minors† and absentees stand in many respects in point of Hindoo law on the same footing, *Latchemenada* v. *Visvanada S.*, 2 *Stra. H. L.* 339.

Section IX.

EVIDENCE OF PARTITION.

Presumption in favour of association—Rebuttal—Question of division one of fact—On which no special appeal lies—Living apart as to food and habitation is not considered a separation such as to disqualify from inheritance—Separate transactions—Gifts and acceptance—Sureties—Practice of agriculture apart—Observance of five great sacraments—Joint performance of ceremonies—Commensality—Separate possession of property—Indication of relinquishment or division of joint property—Division of income does not constitute division of family—Food separately prepared—Purchase of joint stock property by one co-heir—Where brothers lived separate—Trading without aid from the joint funds—If they have left one son with widows—Division of produce without the land—Son takes in exclusion of the widow—Presumption where long residence and food taken apart—Evidence of kinsmen—Occasional employment and receipt of supplies for private expenses are not evidence of union — Circumstantial evidence — Joint

* Gifts not being an essential part of the funeral ceremonies, it is doubtful what *Mr Sutherland* means by referring to them.

† It is not clear how far minors are bound by charitable gifts of adult parceners.

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management of the property—Sonless widow of undivided brother cannot separate and take his share—Nor can the daughter of a former wife take her father's share—Separate caste invitations and presents—Presumption that trade carried on by member of undivided family is joint—Possession of property divided—Silent neglect—Gifts—Dressing food—Religious duties—Income and expenditure—Great difficulty in determining—Jagannatha's summing up.

PRESUMPTION IN FAVOUR OF ASSOCIATION.—The primary, or normal condition of a Hindoo family is that of union. The law, on account of the multiplication of religious ceremonies favours partition, but the presumption in law is that of association or union. Appearances are not conclusive. They may lead to the inference of union, when in fact separation is really the state of the family. A family may remain united in interest, although its members are separated as to residence, meals, and ceremonies. So they may continue to reside, eat, and perform their solemn rights and accustomed ceremonies together, and in all respects appear to be united, whilst in truth they are legally divided by a severance of their worldly concerns, 3 *Dig.* 417; *Khodeeram Serma* v. *Tirlochun, Beng. R. ante*, 1805, p. 37. The question of union or partition is, therefore, often difficult of solution, in consequence of the law permitting the transaction to take place in secret, instead of compelling publicity by requiring the intervention of a deed and witnesses. This opens the door to litigation, injustice, and fraud. The creditor, too often mistaking the appearance for the reality, gives his property relying on the unity of the family, and finds that he has got in exchange an individual for a joint responsibility. Again, if one member of the family wishes for a partition, he may be met on the part of the others by the assertion of division having already taken place. The solution of the difficulty is greatly increased by the conflicting character of the evidence called in support of each side of the case, 1 *Stra. H. L.* 226; *Macn. P. H. L.* 53.

REBUTTAL.—Of course the presumption alluded to, is capable of rebuttal by evidence, showing separate acts amounting to proof of partition having taken place, *ib.* 227.

QUESTION OF DIVISION ONE OF FACT.—Formerly the question of division was considered one of law, and that a written instrument, or evidence of the performance of rites, cooking food separately, &c., was conclusive evidence for, or against the fact of division. It is now however settled that it is purely a question of fact, to be judged of from the evidence, no circumstance being so strong as not to be capable of rebuttal; and a considerable difference exists under the Civil Procedure Code as to whether a matter is to be considered a question of law, or of fact. For in the latter case no special appeal lies in any suit in which the two lower courts agree as to the facts, even if the higher revokes the decision of the lower.

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A special appeal lies only to settle a question of law, or custom having the force of law.

LIVING APART AS TO FOOD AND HABITATION IS NOT CONSIDERED A SEPARATION SUCH AS TO DISQUALIFY FROM INHERITANCE.—2 *Macn. P. H. L.* 172, If of the four brothers of the whole blood, whose paternal moveable property was divided, but whose immoveable estate was undivided, three lived together, of whom one died, and the associated brothers performed his exequial rites with the joint funds, the other brother who lived apart is entitled to one-third of the deceased brother's share of the paternal undivided immoveable property, even though he may not have joined in the performance of his exequial rites. This opinion is conformable to the doctrine laid down in *Menu* and other sages, "When all the debts and wealth have been distributed according to law, any property that may afterwards be discovered shall be subject to a similar distribution," *Menu.* Next, Let brothers of the whole blood divide the heritage of him who leaves no male issue," *Devala.* Again, *Menu* says, "Should the eldest or youngest of several brothers be deprived of his allotment at the distribution, or should any one of them die, his share shall not be lost, but his uterine brothers and sisters, and such brothers as were reunited after a separation shall assemble and divide his share equally." Association merely in point of food or messing together gives no privilege to those so associated over a brother who messes apart, but whose property continues undivided, 2 *Macn. Prins. H. L.* 273, n.

SEPARATE TRANSACTIONS.—In the next place proof is by the circumstance of separate transaction of affairs, as is stated by *Narada*, Gift and acceptance, cattle, grain, houses, land, and attendants must be considered as distinct among separated brothers, as also diet, religious duties, the rules of gift; income and expenditure, *Jim. Vahana*, ch. xiv. § 7; *Mayukha*, ch. iv. s. vii. § 34. Where all invitations and presents are sent by the caste to the two brothers it is evidence of unity and interest, *Mt. Goolab* v. *Mt. Phool*, 1 *Borr.* 154; 1 *Morl. Dig.* 484, § 46. Separated, not unseparated, brethren may reciprocally bear testimony,* *Mayukha*, ch. iv. s. vii. § 34, become sureties for each other, bestow gifts and accept presents. Those by whom such matters are publicly transacted with their coheirs may be known to be separate even without written evidence, *Jim. Vahana*, ch. xiv. § 7; 1 *Stra. H. L.* 227.

GIFTS.—*Gifts* and *acceptance* have reference to borrowing transactions, *Mayukha*, ch. iv. s. vii. § 34. *Acceptance of cattle* and the rest, among separated persons, accomplished by each apart is even the means of generating (sole) ownership, but among unseparated brethren, acceptance by one alone is the origin of the (joint) ownership of the others also. *The rules of gift*, written deeds, or the like. *Income*, entry (or accumulation) of principal and interest, or the

* This would now be no evidence of separation, because the courts in India follow the English law of evidence, under which such witnesses are admissible.

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like. They who have their income, expenditure, and wealth distinct, and have mutual transactions of money-lending and traffic are undoubtedly separate, *Brihaspati, ib.* With regard to income and expenditure, with the infinite dealings in which men's interests are concerned, carried on without consulting the others, and this publicly and without reserve, the same inference arises, 3 *Dig.* 418; 1 *Stra. H. L.* 228; *Jim. Vahana,* ch. xiv. § 8; *Mayukha,* ch. iv. s. vii. § 34.

Sureties.—Husband, wife, father, and son, cannot become sureties for each other before partition, nor reciprocally lend nor give evidence for each other, *Yaⁱnavalchya, Mayukha,* ch. iv. s. vii. § 34; *Jim. Vahana,* ch. xiv. s. 8. With regard to their bearing testimony for each other, the restriction refers only to matters affecting the joint interest, and so raising a direct objection to their competency. But this rule does not now apply as far as evidence is concerned. See *ante*, p. 417, n.

The practice of agriculture or other business pursued apart from the rest, and the observance of the five great sacraments, and other religious duty, performed separately from them, are pronounced by *Narada* to be tokens of partition. The religious duties of unseparated brethren is single, *i.e.*, performed by an act in which all join; severing in them, and performing them separately in their respective houses *after* partition, 1 *Stra. H. L.* 228. When partition indeed has been made, religious duties become separate for each of them, *Mitac.* ch. ii. s. xii. § 3; *Mayukha,* ch. iv. s. vii. § 28, 29. But this is by no means conclusive; various circumstances might occur which would necessitate the separate performance of religious ceremonies. By this (reasoning) in every unseparated family, of whomsoever it may consist, father, grandfather, son, son's son, paternal uncle, brother, brother's son, or other (member,) the religious duty is even single, *Mayukha,* ch. iv. s. vii. § 28; *Menu,* ch. iii. § 69–80; 3 *Dig.* 417, 418, 420. As in the unity of place, time, agent, and the like, one agent is by reasoning obtained for several causes as supporting several parts of one act; so even we may understand from the text that there may be distinct acts of agents otherwise unseparated. Hence, all those religious acts required for performance of sacred as well as of more common rites, even of unseparated brethren, are separate for each, in manner of the distinctions in the nature of a consecrated and a common fire, and the like, though mutually connected. Even so the shraddha also of the paternal uncle, brother, son, or other, (dying without a son,) at the Amavasya and other seasons, is even separate by reason of the separation of the deified (person from the parvana rite.) But the shraddha, &c., of brothers (dying) without maintenance of a sacred fire is to be executed by one instrument or agent only, because all the deified persons are conjoined. In case of separation of place by residence abroad, the shraddhas are even separate. The (extra) acts with the fire, requisite for

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the rites of those who maintained a sacred fire, also, are even separate, but the worship of the household deities are to be done by one agent only. Even so *Sakala* says, Residing with one, dressing of food, worship of a single household deity, and, moreover, one single sacrifice at meals to the manes, show unity. In a family of divided brethren these acts are performed in each house separately, *Mayukha*, ch. iv. s. vii. § 29.

Sir Thomas Strange, 1 *H. L.* 227, divides the religious duties into those that are indispensable and voluntary. Amongst the latter he classes sacrifices, consecrations, stated oblations at noon or evening performance, or nonperformance of which, respects the individual merely, and which may be discharged jointly or severally, so that no inference, one way or the other, can be drawn from their performance.

Where the parties were Soodras. The plaintiff's husband and defendant, being brothers, three years before the death of the former, divided their property, with the exception of a cat, a pillow, a carpet, and a writing-case, and continued to live separate, performing, however, jointly *pungall*, and the annual ceremony for their father. The plaintiff's husband leaving no son, the defendant performed his funeral obsequies, but under plaintiff's protest. Quære, Which is entitled to succeed to the property of the deceased?

The pundit held that the joint performance of ceremonies proved that no division had taken place, and that the estate of the deceased survived to the defendant. Upon which *Mr Colebrooke* remarks that this would be a valid conclusion in a doubtful case. *Narada* says, "When partition has been made, religious duties become separate," *Mitac.* ch. ii. s. xii. § 3. The separate performance of religious duties is accordingly evidence of partition, and conversely the joint performance of them affords a presumption of family partnership in a doubtful case, *Mitac.* ch. ii. s. xii. But it appears from the statement made to the law officer that in this case there was evidence of an actual partition, and the cause turned on a question of fact, which the pundit assumes, from the circumstance above mentioned, against the evidence to which the Court seems to have given credit. Joint performance of obsequies is not conclusive evidence of family partnership against other and satisfactory proof of separation. As to a few articles remaining undivided, it would be no impeachment of a partition otherwise valid; and *Mr Ellis* adds, If the act of division did indeed take place, the joint performance of the ceremonies after (which might proceed from brotherly affection) could make no alteration. Had the division been doubtful, then certainly the joint performance of the ceremonies would be a conclusion against it, a conclusion merely, however, or, as it has been appositely called in another case, a "token," Adyuharana (I suppose in the original) not a proof, 2 *Stra. H. L.* 391.

COMMENSALITY.—A separation from commensality does not, as a

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necessary consequence, effect a division, or at least of the whole undivided property, *Rewun Persad* v. *Mt. Radda Beeby*, 4 *Moore's In. Ap.* 168. The mere circumstance of messing conjointly is not conclusive proof of co-parcenery, *Khodeeram Serma* v. *Tirlochum*, 1 *S. D. A. R.* 35, 1801; 1 *Morl. Dig.* 483 § 40.

In 1 *Macn. H. L.* 54, it is said the only criterion of division consists in members of the family entering into distinct contracts, and other similar acts, which tend to show that they have no dependence on, or connexion with each other, 3 *Dig.* 415; 1 *Stra. H. L.* 225–227; 2 *ib.* 397.

SEPARATE POSSESSION OF PROPERTY.—It is presumed, if they have separate possession of property, *Than Sing* v. *Mt. Jeetoo*, 2 *R. S. D. A.* 320.

INDICATION OF RELINQUISHMENT OR DIVISION OF JOINT PROPERTY. —R., the defendant's brother, borrowed money from the plaintiff. After R.'s death, N., another brother, let some villages to the plaintiff, on an agreement to allow the rents to be applied towards paying R.'s debt, and to execute a writing for the balance. On N.'s death, a balance being due, it was required to know whether the defendant was liable, he and his brothers never having divided though they lived separate. The pundit replied, that though the defendant and his brothers had never actually divided, yet if he lived alone, unconnected with them, acquiring property independently of the paternal estate, or of aid from them, distinct not only in his dealings, but in his offerings also to their common ancestors, or if the debt contracted was not for the support of the family, he being connected with it, in any of these cases he is not answerable to the plaintiff for the balance, unless he should be in possession of assets belonging to R. See *Yajnavalchya* and *Narada;* 1 *Dig.* 282, clxxx.; 3 *ib.* ccclxxi.

Mr Ellis says, The circumstances here stated, and many others, indicate either division, or relinquishment of joint property, but do not constitute absolute proof of it. Notwithstanding the proof of such circumstances, the judge ought to satisfy himself that the separation was such as equitably to release the defendant from responsibility for the acts of his co-parceners. Admitting every circumstance indicating division, still if it appeared that one of the parceners allowed the semblance of an undivided family to exist either by occasionally asserting or not denying it when asserted, and that a stranger actuated by impressions so received, lent money, or formed contracts with the others, a parcener so acting would be answerable for such debts, and must abide by such contract. This applies, however, in strictness to brothers only. The natural connexion between cousins, &c., is not so great, and less therefore is required to establish their separation. Perhaps sometimes it may be incumbent on the claimant to prove their union, which among brothers the law infers, 2 *Stra. H. L.* 346.

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Separate acquisition is no evidence either way; it is equally consistent with division and unity.

DIVISION OF INCOME DOES NOT CONSTITUTE A DIVISION OF FAMILY.—A Bengalee testator, after bequeathing all his moveable and immoveable property to the family idol, directed that his property should never be divided by his sons, &c., but that they should enjoy the surplus proceeds only, and that the surplus, after deducting the whole of the expenditure, should be added to the *corpus*, and that in the event of disagreement between the sons and family, he directed that after certain expenses, the net produce and surplus should be divided annually in certain proportions among the family. At the date of the will the family were joint in estate food, and worship, held that the division of the income arising out of the testator's estate among the members of the family, after the testator's death, did not constitute a division of the family, *Sonatum Bysack* v. *Sreemutty Juggutsoondree Dossee*, 8 *Moore's In. Ap.* 66.

FOOD SEPARATELY PREPARED.—The instance most relied on is the taking food separately prepared, while the parties are residing in the same house. This, too, is but a circumstance, and capable of being explained.

PURCHASE OF JOINT-STOCK PROPERTY BY ONE CO-HEIR.—As a purchase of joint-stock property may be made by one co-heir from the others, provided all join in it, that would *per se* be no evidence of division, *Stra. Man. H. L.* § 300; *S. A. No.* 88 *of* 1860, *Judgment of Sadr Court.*

WHEN BROTHERS LIVED SEPARATE, TRADING WITHOUT AID FROM JOINT FUNDS—SON—WIDOWS.—Three brothers deceased carried on their concerns in their lifetime separately in different villages for thirty or forty years. No releases appeared among them, nor was there written proof that they had divided. 1. Are they to be considered as having divided, or is it competent for their respective representatives to call for a division? 2. Supposing them to have left one son with widows, to whom does their property belong? Answer of the Pundits:—If there be suitable evidence, or visible marks applicable to a divided estate, it is not necessary that there should be a deed of division in writing. If sons, grandsons, or kinsmen have lived long separate, carrying on traffic and other worldly concerns without aid from the common stock, performing also religious ceremonies separately, there will be no ground for a division of such existing separate estates.

Of the property in question, any that remained undivided vests in the surviving son to the exclusion of the widows. *Mr Colebrooke* remarks, The answer to the first question is correct, *Mitac.* ch. ii. s. xii., ch. i. s. 9.

On the second question a difference of opinion exists whether an undivided residue shall be subject to rules of succession relative to

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separated, or unseparated brethren. Authorities are cited on both sides, but the opinion here given seems the best, 2 *Stra.* 387.

DIVISION OF PRODUCE WITHOUT THE LAND.—Distribution of the produce without division of the land does not necessarily constitute a divided family, 1 *Stra. Man. H. L.* 288.

PRESUMPTION WHERE LONG RESIDENCE AND FOOD TAKEN APART.—Twenty-five begas of land in one village, and seven in another, formed the ancestral estate of the three appellants, and of the respondent's husband, all of whom descended from the same grandfather. The appellants were possessed of the former, and discharged the rent, the respondent's husband and herself did so for the other seven begas. The appellants resided in the former village, the respondent's husband and herself resided in the latter. It was not clearly ascertained that the lands were formerly divided between the appellants and the respondent's husband, agreeably to their respective shares. From its being specified that the rent due from the twenty-five begas was discharged by the appellants, and that due from the seven begas by the respondent's husband and herself, it may be inferred that the respondent's husband lived separated from his co-heirs, and discharged the rent due on account of the land in his possession by reason of partition having taken place. It is a rule of law that if brothers live apart from each other, and partition is alleged to have taken place so long ago as 1197 *Fuslee*, that no writing on the subject, or other record can be found, and if it be proved that they, for a long time, have lived apart, and have been separate in respect to residence and food, the partition will be presumed, 2 *Macn. Prins. H. L.* 170.

EVIDENCE OF KINSMEN.—If a question arise among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution, or by separate transaction of affairs, separate possession of house or field, *Mayukha*, ch. iv. s. vii. § 27; *Jim. Vahana*, ch. xiv. § 1, 2, 6; *Mitac.* ch. ii. s. xii. § 1; 2 *Macn. Prins. H. L.* 170, n.; 1 *Morl. Dig.* 483. In the first place, kinsmen, or persons allied by community of funeral oblations, on failure of them, relatives, as signified by the term *bandhu;* in default of these, strangers, *Jim. Vahana*, ch. xiv. § 3. *Sankha* says, The family may give evidence if the matter be not known to the relations springing from the same race. Relations sprung from the same race are kinsmen, "family," or relatives, (as maternal uncles, and the rest) may give evidence. But not a stranger, while a person of the family can bear testimony; but if these also be uninformed, any other person may give evidence, *Jim. Vahana*, ch. xiv. § 4; *Mitac.* ch. ii. s. xii. § 1–4.

OCCASIONAL EMPLOYMENT AND RECEIPT OF SUPPLIES FOR PRIVATE EXPENSES ARE NOT EVIDENCE OF UNION.—A member of a Hindoo family, (among whom there had been no formal articles of separation,) who, with his father, had messed separately from the rest, and had no share in their profits, or loss in trade, though he had occa-

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sionally been employed by them, and had received supplies for his private expenses, is presumed separate, and is not entitled to a share of the acquisitions of the others of the family, *Rajkishor Rai* v. *Widow of Santoodas*, 1 *S. D. A. R.* 13, (1796;) 1 *Morl. Dig.* 483, § 39.

CIRCUMSTANTIAL EVIDENCE.—Partition may be inferred from circumstantial evidence, *Doe d. Ramasamy Moodeliar* v. *Vallatah*, 1 *Morl. Dig.* 484, § 42.

JOINT MANAGEMENT OF THE PROPERTY.—The management of the property by the family is evidence that it belongs to them jointly, in opposition to the claim of any one of them singly, 2 *Stra. H. L.* 333.

THE SONLESS WIDOW OF AN UNDIVIDED BROTHER CANNOT SEPARATE AND TAKE HIS SHARE, NOR CAN THE DAUGHTER OF A FORMER WIFE TAKE HER FATHER'S SHARE.—Where three undivided brothers lived and ate together with the mother, but traded separately; two of the brothers died, one leaving a widow and a daughter by a former wife; the other, a widow and two sons. It was held that the brother and descendants of the two deceased, could not be considered as a divided family, and the widow and two sons will be permitted to possess their father's share, but the widow of the other brother cannot be permitted to separate, and take her husband's share. Nor has the daughter, by a former wife, any right to separate and take her father's share, because he died without previous separation, and leaving no son, the other members of the family are, however, bound to maintain the widow and daughter, *Mt. Rajkoonwur* v. *Mt. Dhunkoonwur*, 1 *Borr.* 207; 1 *Morl. Dig.* 484, § 45.

SEPARATE CASTE INVITATIONS AND PRESENTS.—A Hindoo Brahmin woman claimed her father's estate from one of his brother's, and a son of a second, on the ground of their being separate, as well as under a will of her mother in her favour. The will was held to be void, as, if the three brothers had been *bonâ fide* separate in all their interests, the share of the last brother would have descended to his daughter without the will, and if no separation had taken place the will could not defeat the superior rights of her deceased father's brother and nephew. On investigation, it was found that although the three brothers were so far disunited as to receive caste invitations and presents separately. Yet there was no proof as to their carrying on distinct concerns, or having divided among them the family estate, *Bhugwan Goolabchund* v. *Kriparam Anundram*, 2 *Borr.* 24; 1 *Morl. Dig.* 484, § 48.

PRESUMPTION THAT TRADE CARRIED ON BY MEMBER OF UNDIVIDED FAMILY IS JOINT.—Where there is no formal separation of interests between brothers, and the parties have lived together as an undivided family till five years after the death of one of the brothers, the presumption clearly is that a trade carried on by the brothers is a joint one, and in the absence of all proof that there was a separation of interests between the members of the family, or that any

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part of the property was self-acquired by one of the brothers independently of funds, or other aid afforded by the others, the sons of the deceased brother are entitled to share in the whole property of the family, *Bairy Cundappah Chitty* v. *Bairy Cristnamah Chitty*, 1 *Mad. Dec.* 372 ; 1 *Morl. Dig.* 485, § 50.

POSSESSION OF PROPERTY DIVIDED.—The record of partition which brothers and other co-heirs execute, after making a just distribution by mutual consent, is called the written memorial of distribution. *Vrihaspati*, "When a village, a field, and a garden are recorded in the same grant, if any part be occupied they are all legally possessed. Thus, on a partition among brothers, whether village or other land is inserted in a written record of partition, should some part thereof be occupied, and the remainder be not possessed, still the whole land is considered in law as actually possessed, not as property neglected." *Vrihaspati* cited in *Vyavahara-matrica*, 2 *Macn. Prins. H. L.* 171. In immoveable property obtained by an equitable partition, or by purchase, or inherited from the father, or received from the king, a title is gained by long possession, and not lost by silent neglect. Even in property simply obtained with or without a fair title which a man has accepted and quietly possessed, unmolested by another, he acquired a title, and in like manner he forfeits one by silent neglect, *ib.*

By possession the title over property obtained by an equitable partition, by purchase, or by similar instances, is established, and the silent neglect of the possession constitutes the forfeiture of such property, 2 *Macn. Prins. H. L.* 171.

"When co-heirs have made a distribution, the acts of giving and receiving cattle, grain, houses, land, household establishments, dressing victuals, religious duties, income, and expenses, are to be considered as separate and (conversely) as proofs of partition," *Narada*.

It will have been seen, therefore, that there is great difficulty in determining whether the family be a divided or an united one. The question is one of importance ; it sometimes arises among the members of the family themselves, one member claiming partition, whilst the rest allege that it has already taken place ; sometimes amongst creditors, whose interest it is to treat the family as undivided, as they thereby extend the fund, to which they look for payment of their debts, the credit having been given under that impression, though erroneous ; 1 *Stra. H. L.* 226 ; *ante*, pp. 80, 325.

With respect to any one or more of the instances specified they are but evidence ; though the concurrence of all to constitute proof is not required, for those texts are founded on reason, and the reason is equally applicable in every instance, *Jim. Vahana*, ch. xiv. § 10.

Sir Thomas Strange, 1 *H. L.* 228, says, The one the most to be relied on is the taking food separately prepared, yet as it may be matter of convenience among co-heirs having large families to have separate cookery, dressing their victuals apart, this also is

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but a circumstance which may be explained, or its effect in point of evidence may be removed by showing not separate but joint preparation of grain for oblations to deities and the entertainment of guests, as well as for other purposes, which, among united co-heirs, are essentially common. But in general a distinct preparation of food, after an agreement to separate, proves partition, and the previous agreement may, in some cases, be inferred from that sole evidence; but more satisfactorily in proportion as a greater number of the indicated circumstances concur, 3 *Dig.* 421, 428.

The joint performance of obsequies is not conclusive evidence of family partnership in the face of positive evidence to the contrary, 2 *Stra. H. L.* 391, 392, *C.* and *E.*

JAGANNATHA'S SUMMING UP.—*Jagannatha* sums up this subject thus, In a doubt respecting a prior distribution among those who severally transact commercial affairs, and the like, but without having separated their preparation of food by a previous agreement, what (he asks) is the rule of decision if the dispute concern that property to which the transactions relate? Deduce the principle of decision (he answers) from reciprocal gift and receipt, for in that case donation, which is an act done for a spiritual end, has been made in contemplation of abundant fruit from liberality to a kinsman. Again, the people know whether these co-heirs have separated their preparation of food by previous agreement or not. Again, do the peasants deliver to them severally the provisions and other dues from their village? Hence, also, a principle of decision may be deduced. In like manner the question may be determined by their annual obsequies for a deceased ancestor, and by their worship of *Lachsmi*, or other deities, and the like, 1 *Stra. H. L.* 230.

SECTION X.

RE-UNION.

Partition after — Definition of—Benares school limits re-union to father, brother, or paternal uncle—But it includes all those who make partition—Mode of effecting re-union—Separation after re-union—Superior allotment in right of primogeniture forbidden—Acquirer gets a double share of wealth gained by science, even with aid of common stock—The order of succession of one dying after re-union is an exception to that of obstructed heritage—Exception to rule that a re-united brother shall keep the share of his re-united co-heir—The right of whole brothers not re-united and half brothers re-united — Fixed property the uterine brother takes, concealed wealth and animals he shares with those re-united—The son succeeds in all cases—The son of one re-united succeeds before other

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re-united persons—In other cases, the parents, and first the mother, then brother, maternal uncle, &c., equally—The brothers not re-united share with re-united uncles—Re-union of wife alone—If others re-united she does not succeed—Among un-re-united persons succeeding to one re-united with other members of the family, the mother is first, then the father—The eldest wife.

PARTITION.—After partition has taken place the family may become re-united, and afterwards a second separation may take place.

DEFINITION.—The divesting of exclusive rights in specific portions of property, and re-vesting a common one over the whole, is implied in re-union, 1 *Stra. H. L.* 177.

A RE-UNION BETWEEN SEPARATED CO-HEIRS MAY TAKE PLACE.—*Brihaspati* says, "He who being once separated dwells again, through affection, with his father, brother, or paternal uncle, is termed re-united," *Mayukha*, ch. iv. s. ix. § 1; *Jim. Vahana*, ch. xii. § 3; *Mitac.* ch. ii. s. ix. § 3. Effects which had been divided, and which are again mixed together, are termed re-united. He to whom such appertain is a re-united parcener, *Mitac.* ch. ii. s. ix. § 2.

MITACSHARA LIMITS RE-UNION TO FATHER, BROTHER, OR PATERNAL UNCLE.—This re-union cannot take place with any person indifferently, but only with a father, a brother, or a paternal uncle and his nephews, *ib.* § 3; *Jim. Vahana*, ch. xii. § 3. But the proper sense is, that this [re-union] arises, even from the joint location of the makers of the [first] partition. For the words, father, and the rest, are merely as a part to denote the whole of the persons who make the partition, *Mayukha, ib.* § 1.

In the Mithila school re-union takes place with the nephew and the rest, *Daya Krama Sangraha*, ch. v. § 5.

BUT IT INCLUDES ALL THOSE WHO MAKE PARTITION.—Re-union may take place with a wife, a paternal grandfather, a brother's grandson, a paternal uncle's son, and the rest also. "He who being once separated [from the co-heirs] dwells again [in common is termed re-united]" from joint location [of such a one,] the sense of separated brothers, [one's own] sons, and the like, does not result, *Mayukha*, ch. iv. s. ix. § 1.

An adult brother, a member of an undivided Hindoo family, separated from the family. No regular partition of the estate was made. The lands remained undivided, and each member took his share of the rents. After a short separation, the brother returned to the family, and it was by a deed of ungshoputtur, or settlement, agreed that the acquisitions made by the elder brother during the separation should go into the joint funds. During the separation, the elder brother purchased a Putnee Talook:—Held that the re-union of the brother to the family remitted him to his former *status* as a member of a joint Hindoo family, and that he was entitled to share in the purchase, as it must be presumed to have been made out of the funds of the

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joint estate, *Prankishen Paul Chowdry*, v. *Moltrooramohun Paul Chowdry*, 10 *Moore's In. Ap.* 403.

MODE OF EFFECTING RE-UNION.—[When two settle thus.] "The present of future wealth of us two is common property, until we make a partition a second time." When there exists such a sign, either by understanding or expressed wish, it is an union, *Mayukha*, ch. iv. s. ix. § 1.

SEPARATION AFTER RE-UNION.—After re-union there may be an entirely new partition.

In that case the shares must be equal. There is not in this instance any right of primogeniture, *Menu*, ch. ix. § 120; *Vishnu*, 18, 41; *Mayukha*, *ib.* § 2.

THE SUPERIOR ALLOTMENT IN RIGHT OF PRIMOGENITURE FORBIDDEN.—[The shares must be equal.] This supposes re-union of brothers belonging to the same tribe. But in the case of association of brothers, appertaining, the one to the sacerdotal, the other to the military tribe, the rule of distribution must be understood to conform with the original allotment of shares; for the text is intended only to forbid an elder brother's superior portion, as before allotted to him. Accordingly [since unequal partition regulated by difference of tribes is not denied,] *Vrihaspati* saying, "Among brethren who, being once separated, again live together through mutual affection, there is no right of primogeniture when partition be again made," prohibits only the assignment of a superior share to the eldest, but does not ordain equality of allotments, *Jim. Vahana*, ch. xii. § 2; *Mayukha*, ch. iv. s. ix. § 2; *Menu*, ch. ix. § 210; 3 *Dig.* 475. Some say that the unequal distribution being set aside by the phrase, the share must in that case be equal, the prohibition of the eldest son's right is repeated, for the sake of making it clearly understood that, although there is to be no inequality in making up the share of the eldest son, yet in the distribution the shares may be even unequal when made up of greater and lesser shares at the time of re-uniting the property, *Mayukha*, ch. iv. s. ix. § 2.

But since the term "eldest son's right," [jyeshtyam,] and the like, is merely a declaration of the general meaning, therefore, if [the contributions to] the wealth were greater, and less, still the share of each must be equal, and the same is the popular practice. Hence, as the foundation of the practice is derived from this text, any supposition of a declaration contrary thereto, is at variance with reason, *Mayukha*, ch. iv. s. ix. § 3.

ACQUIRER GETS A DOUBLE SHARE OF WEALTH GAINED BY SCIENCE EVEN WITH AID OF COMMON STOCK.—"If any one of the re-united brethren acquire wealth by science, valour, or the like, [with the use of the joint stock,] two shares of it must be given to him, and the rest shall have each a share," *Brihaspati*. See *Jim. Vahana*, 165, ch. xi. s. i. § 20; 3 *Dig.* 551. The meaning of the text is that a double share being established for the acquirer by the phrase,

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"to the acquirer two shares;" then in a partition among [unseparated] brethren not re-united he gets two shares only in what he has acquired, without detriment to the father's wealth. But in a fresh partition among re-united brethren, he gets two shares of what was acquired by him, even if at the detriment of the re-united property, *Madana*, *Mayukha*, ch. iv. s. ix. § 4.

THE ORDER OF SUCCESSION OF ONE DYING AFTER RE-UNION IS AN EXCEPTION TO THAT OF OBSTRUCTED HERITAGE.—*Yajnavalchya* enumerates the order of those entitled to succeed to the wealth of one re-united, "As of a re-united co-heir the re-united co-heir, so of the uterine brother the uterine brother, which is an exception to the regular succession failing male issue of the wife, the daughters, and the rest, *Mayukha*, *ib.* § 5.

A re-united [brother] shall keep the share of his re-united co-heir, who is deceased, or shall deliver it to a son subsequently born, *Yajnavalchya*, 2, 139; *Mitac.* ch. ii. s. ix. § 1.

The share or allotment of such re-united parcener deceased must be delivered by the surviving re-united parcener to a son subsequently born, in the case where the widow's pregnancy was unknown at the time of the distribution. Or on failure of male issue, he and not the widow, nor any other heirs, shall take the inheritance, *Mitac.* ch. ii. s. ix. § 4.

EXCEPTION TO THE RULE THAT A RE-UNITED BROTHER SHALL KEEP THE SHARE OF HIS RE-UNITED CO-HEIR.—'But a uterine [or whole] brother shall thus retain, or deliver the allotment of his uterine relation, *Yajnavalchya*, 2, 139. The construction is this, The allotment of a re-united brother of the whole blood who is deceased, shall be delivered by the surviving re-united brother of the whole blood, to a son born subsequently; but on failure of such issue he shall retain it. Thus, if there be brothers of the whole blood and the half blood, an uterine [or whole] brother being a re-united parcener, not a half brother who is so, takes the estate of the re-united uterine brother, *Yajnavalchya*, *Mitac.* ch. ii. s. ix. § 6; *Mayukha*, ch. iv. s. ix. § 8.

THE RIGHT OF WHOLE BROTHERS NOT RE-UNITED, AND HALF BROTHERS RE-UNITED.—"One of a different womb being again associated, may take the succession, not one of a different womb if not re-united. But [a whole brother if] re-united obtains the property, and not [exclusively] the son of a different mother." Here, from the terms, one of a different womb, son of a different mother, the half brother alone is not designated, but the paternal uncle and others likewise, *Yajnavalchya*, *Mayukha*, ch. iv. s. ix. § 10. See. *Mitac.* ch. ii. s. ix. § 3.

The following are the meanings of the terms of this text, "one of a different womb;" that is, one of a separate womb, [such] the wife, the father, the father's father, the half brother, the paternal uncle and others, if they be re-united, may take the wealth. If not re-united, those of a different womb do not [succeed.] Hence,

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by reason of the rule respecting fitness and dissimilitude,* the re-union of one of a different womb is declared as the reason for his taking the wealth. A whole brother, termed re-united [by union of the womb,] even if not re-united, [by re-union of the wealth,] will take the property. By this reasoning, the community of womb alone even is declared a sufficient reason. So one re-united, as possessing union of wealth; but if only born of a different mother, he will not take anything whatsoever, *Mayukha,* ch. iv. s. ix. § 12.

So that the one from his re-union, the other from his community of womb, both jointly share and take it [between them.] *Menu,* ch. ix. § 211, 212, specially determines this very principle in the right of succession among re-united persons, "Should the eldest or youngest of several brothers be deprived of his allotment at the distribution, or if any of them die, his share shall not be lost;" but the uterine brothers and sisters, and such as were re-united after a separation, shall assemble together and divide his share equally," *Mayukha,* ch. iv. s. ix. § 13; *Mitac.* ch. ii. s. ix. § 12.

Be deprived of means by entering another order, by degradation from sin, or the like.

Uterine must be joined with brothers in construction.

And such as were re-united, i.e., the wife, the father, the paternal grandfather, the half brother, the paternal uncle, and the rest, *Mayukha, ib.*

FIXED PROPERTY THE UTERINE BROTHER TAKES, CONCEALED WEALTH AND ANIMALS HE SHARES WITH THOSE RE-UNITED.—On this point *Prajapati* states a distinction, "Whatever concealed wealth is brought to light becomes the property of the united parceners; but lands and houses, those not reunited, shall entirely take according to their shares," *Mayukha,* ch. iv. s. ix. § 14.

Concealed wealth.—What is capable of being hidden by depositing in the ground or otherwise, as gold, silver, or the like; such, those re-united, that is, of a different womb, shall take; but landed property the uterine brother [takes.] Kine, horses, and other [animals] the uterine and he of a different womb [shall share.] According to *Madana,* he of a different womb alone, if reunited, will take the houses, horses, and the like; but it is not so noted in the text, *Mayukha,* ch. iv. s. ix. § 15.

According to the *Smriti Chandrika,* But if there exist only one species of property out of the [above sources, as] concealed wealth, land, kine, and the rest, the uterine brother alone, even not re-united, takes it. The proof of this must be considered. Among uterine brothers, if some of them are re-united, but other brothers not, nevertheless, those re-united alone will take the wealth, because community of womb, and re union exist as a double cause [of

* *Dig.* 9, note. In logic, *Anwya* and *Vyatireka;* the first is the relation of events, of which whenever one occurs the other also occurs; the second is the connexion of circumstances, of which, when one occurs not, the other also does not occur, *Mayukha,* note 1, ch. iv. s. ix.

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succession.] Even so *Gautama*, "When a re-united [parcener] dies, his re-united co-heir shares his estate;" and *Brihaspati*, "Two brothers, who become re-united through affection, [after being separated,] share mutually," *Mayukha*, ch. iv. s. ix. § 15.

THE SON SUCCEEDS IN ALL CASES.—A son, whether re-united with his father or not re-united, shall obtain the entire paternal share, since the power of intercepting the right to take a share lies in the filial relation. Among several sons also, when one is re-united and the other is not, the re-united one alone succeeds by the text, "Of a re-united [co-heir,] the re-united [co-heir], so of the uterine brother, the uterine brother," ib. § 16. See *Mayukha*, ch. iv. s. ix. § 5., *ante*, p. 428.

THE SON OF ONE RE-UNITED SUCCEEDS BEFORE OTHER RE-UNITED PERSONS.—In a case of re-union between a father, son, and any other not being his son, the son alone succeeds, because the same has already been declared by the terms, "Shall either give up or shall retain," &c., *Mayukha*, ch. iv. s. ix. § 17.

IN OTHER CASES, THE PARENTS, AND FIRST THE MOTHER.—In an assemblage of father, brothers, paternal uncles, and others not being sons re-united, the parents alone [take it.] Of them, again, the mother is first, and then the father, according to *Madana*, *Mayukha*, ch. iv. s. ix. § 18.

THEN THE BROTHER, PATERNAL UNCLE, ETC., EQUALLY.—But [after them] the brother, paternal uncle, and the rest, shall even take and share it [equally,] for among them all the state of union exists, as the cause whence their right of taking [shares] is derived, *Mayukha*, ch. iv. s. ix. § 19.

THE BROTHERS NOT RE-UNITED SHARE WITH RE-UNITED UNCLES.—So likewise in an assemblage of un-re-united brothers, re-united paternal uncles, half-brothers, and others, they even share it [in common] by reason of the two phrases. "If not re-united, but [a whole brother if] re-united obtains the property, and not [exclusively] the son of a different mother;" the other, "As of a re-united [co-heir,] the re-united [co-heir;] so of the uterine brother, the uterine brother," *Mayukha*, ch. iv. s. ix. § 20. See § 5, 10, p. 428.

THE WIFE IF ALONE RE-UNITED.—In case of the re-union of the wife alone, she alone takes it from the same text of a re-united [co-heir,] the re-united [co-heir.]

IF OTHERS RE-UNITED SHE DOES NOT SUCCEED, BUT MUST BE MAINTAINED.—In the assemblage of the other persons re-united together, with her also re-united, they alone succeed, she does not, moreover, in commencing the topic of re-union, both *Sankha* and *Narada* have declared, "Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided they preserve unsullied the bed of their lord, but if they behave otherwise the

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brethren may resume that allowance." "The maintenance of the daughter of such a one, is enjoined to be made out of her father's share; if still un-initiated, she will take a share [for the purpose ;] if he die after that, her husband shall support her," *Mayukha*, ch. iv. s. ix. § 22; *Mitacshara*, ch. ii. s. ix. p. 326, Ed. of 186 ; *Jim. Vahana*, 177, Ed. of 186 .

AMONG UN-RE-UNITED PERSONS SUCCEEDING TO ONE RE-UNITED WITH OTHER MEMBERS OF THE FAMILY, THE MOTHER IS FIRST, THEN THE FATHER, THE ELDEST WIFE.—As for what *Sankha*, in proceeding to expound re-union, says, "Of those also departed for heaven without male issue, the property goes to the brothers; in default of them both parents will take it, or the eldest wife," it, according to *Madana*, is intended to fix the order of the un-re-united brothers, and the other upon the death of one dying re-united subsequent to the death of his paternal uncle, brother's son, or half brother, with whom he had previously made a re-union; and, according to the same authority, in this case also first the mother, and next the father, *ante*, p. 430, *the eldest wife*, *i.e.*, she who [best] preserves her duty, *Mayukha*, ch. iv. s. ix. § 24. See *Mitac.* ch. ii. s. ix. pp. 327–339 of Ed. 186 ; *Jim. Vahana*, ch. xii. p. 163 of Ed. of 186

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